Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SUQUAMISH INDIAN TRIBE,

Petitioner,

v.

UPPER SKAGIT INDIAN TRIBE, SWINOMISH INDIAN TRIBAL COMMUNITY, JAMESTOWN S'KLALLAM TRIBE, LOWER ELWHA KLALLAM TRIBE, LUMMI INDIAN NATION, NISQUALLY INDIAN TRIBE, PORT GAMBLE S'KLALLAM TRIBE, SKOKOMISH INDIAN TRIBE, AND TULALIP TRIBES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court implementing an unambiguous court order is bound to apply that order according to its plain terms, or whether the court should instead determine whether the judge who initially issued the order "intended something other than its apparent meaning," as the Ninth Circuit held in this case.

RULE 14.1(b) STATEMENT

Although appearing in the caption below, the United States and the State of Washington are not named parties to and did not specifically appear in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Suquamish Indian Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a–13a), issued pursuant to the panel's grant of rehearing, is reported at 590 F.3d 1020. The panel's initial, withdrawn opinion (App., *infra*, 14a-30a) is reported at 576 F.3d 920. The district court's order (App., *infra*, 31a–54a) is not reported.

JURISDICTION

The court of appeals granted respondents' petition for rehearing on January 5, 2010, and concurrently issued its judgment. Petitioner timely filed a motion for rehearing en banc, which the court of appeals denied on February 16, 2010. App., *infra*, 55a-56a. On May 10, 2010, Justice Kennedy extended the time for filing a petition for a writ of certiorari to July 1, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

This case presents the question whether judicial orders should be applied according to their plain terms. In 1975, Judge George Hugo Boldt of the United States District Court for the Western District of Washington issued an order recognizing that the Suquamish Indian Tribe, petitioner here, has the right to fish in "the marine waters of Puget Sound," an area that unambiguously includes subsidiary bodies of water known as Saratoga Passage and

Skagit Bay. In this case, however, the Ninth Circuit applied Judge Boldt's order to *deny* the Suquamish the right to fish in these waters. In doing so, the court of appeals declined to "accept[] Judge Boldt's unambiguous definition of 'Puget Sound,'" instead applying an interpretive standard that requires a court implementing an existing judicial order to look for evidence "that the court [issuing the order to be applied] intended something other than [the order's] apparent meaning." App., *infra*, 8a-9a. Using this test and re-assessing the evidence that was before Judge Boldt in 1975, the Ninth Circuit concluded that Judge Boldt did not intend his order to be applied as written.

This approach to the application of judicial orders, which departs from the rule that governs in every other circuit that has addressed the matter, is plainly wrong. This Court, in circumstances materially identical to those in this case, has held unequivocally that, "where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *Travelers Indem. Co.* v. *Bailey*, 129 S. Ct. 2195, 2004 (2009). This Court also recognized that other courts of appeals, specifically including the First and Second Circuits, have embraced the same approach. *Ibid.* The Ninth Circuit's aberrant departure from this rule determined the outcome here: that court itself evidently recognized that the Suquamish would prevail were the unambiguous language of Judge Boldt's controlling order applied as written. Such a holding, and the conflict in the circuits it produced, should not stand.

That is especially so because the issue of interpretation presented here is a recurring one of substantial practical importance. Standing judicial

orders are applied repeatedly in the widest range of areas, which makes certainty and consistency in the rules governing the application of such orders essential. Yet the Ninth Circuit's interpretive rule guarantees uncertainty, while threatening to upset the settled expectations of the parties subject to judicial orders. It also invites continuing relitigation of matters that seemingly were resolved long ago, an outcome that Judge Kleinfeld, dissenting below, recognized will be "extremely burdensome and expensive." App., *infra*, 12a-13a. Moreover, the particular context in which the issue is presented here, involving treaty fishing rights of Pacific Northwest tribes that this Court has identified as "vital," is itself a matter of great economic and cultural significance. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664, 666, 678 (1979) ("*Fishing Vessel*"). For all of these reasons, further review is warranted.

A. Tribal Fishing Rights In The Pacific Northwest.

This case involves a dispute over fishing rights in Puget Sound that are guaranteed by treaties between the United States and Indian tribes of the Pacific Northwest. "To extinguish the last group of conflicting claims to the lands lying west of the Cascade Mountains and north of the Columbia River in what is now the State of Washington, the United States entered into a series of treaties with Indian Tribes in 1854 and 1855." *Fishing Vessel*, 443 U.S. at 661-62. Under the leadership of Chief Seattle, the Suquamish, along with several other tribes, signed the Treaty of Point Elliott on January 22, 1855. See 12 Stat. 927. The "Tribes ceded their aboriginal lands to the United States for settlement, receiving in

exchange exclusive title to defined lands, free medical care, schools, occupational training, and annuity payments." *United States* v. *Washington*, 157 F.3d 630, 638 (9th Cir. 1998). Of particular importance, the tribes expressly reserved their rights to continue fishing in their traditional grounds; the Treaty specifically provided that "[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory." 12 Stat. at 928 (art. V). See *Fishing Vessel*, 443 U.S. at 662, 674-76.[1]

As this Court has recognized, the guarantee of fishing rights was of central importance to the tribes, which "shared a vital and unifying dependence on anadromous fish"; the tribes were "vitally interested in protecting their right to take fish at usual and accustomed places, * * * and * * * they were invited by the white negotiators to rely and in fact did rely heavily on the good faith of the United States to protect that right." *Fishing Vessel*, 443 U.S. at 664, 667. Such fishing rights remain vitally important to this day, as "anadromous fish constitute a natural resource of great economic value" in the Pacific Northwest. *Id.* at 664. There is no denying the significance of these interests: this Court has addressed issues arising out of "the fishing clause in these treaties" on at least seven occasions. See *id.* at 679 (citing decisions).

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[1] Although the United States entered into a series of treaties with the tribes of what is now Washington State (see *Fishing Vessel*, 443 US. at 661-62 & n.2), almost identical language is included in each. See *id.* at 674 & n.21.

B. *United States* v. *Washington*.

The century that followed execution of the treaties was marked by "frequent and often violent controversy between Indians and non-Indians over treaty right fishing." *United States* v. *Washington*, 384 F. Supp. 312, 329 (W.D. Wash. 1974) ("*Decision I*"). See also *Fishing Vessel*, 443 U.S. at 668-69. In 1970, the United States filed suit against the State of Washington, alleging that the State was impairing treaty fishing rights. *Decision I*, 384 F. Supp. at 327-28. Several tribes later joined as intervenor plaintiffs. *Id.* at 327. Years of discovery followed. *Id.* at 328.

In 1974, Judge Boldt issued substantial findings and concluded that, "[b]ecause the right of each treaty tribe to take anadromous fish arises from a treaty with the United States, that right is reserved and protected under the supreme law of the land, does not depend on state law, is distinct from rights or privileges held by others, and may not be qualified by any action of the state." *Decision I*, 384 F. Supp. at 402. Ultimately, Judge Boldt concluded that the treaties—which provide that Indian tribes are to fish "in common with" others—entitle "treaty tribe[s]" to a 50% share of all fish taken in areas of Puget Sound that constitute the "usual and accustomed grounds and stations" (the "U&A") of a tribe at the time the treaties were signed. *Id.* at 343, 386.

To effectuate this guarantee, Judge Boldt sought to determine each tribe's specific U&A, examining "the freshwater systems and marine areas within which the treaty Indians fished at varying times, places and seasons, on different runs," and considering a range of evidence, including the testimony of anthropologist Barbara Lane. *Decision I*, 384 F.

Supp. at 350, 402. Based on these factual findings and legal conclusions, Judge Boldt issued an injunction that detailed with great precision the Tribal-State fishing relationship and the U&As of the various tribes. *Id.* at 413-19. A determination that a particular geographic area fell within a tribe's U&A entitled the tribe to exercise its treaty rights to a share of the fish harvested in that location. *Id.* at 343, 403-04. On direct appeal of this order, the Ninth Circuit affirmed, *United States* v. *Washington*, 520 F.2d 676, 685 (9th Cir. 1975), and this Court denied certiorari, 423 U.S. 1086 (1976).

In his initial order, Judge Boldt recognized that he had not adjudicated the U&As for all tribes in the Puget Sound region. Thus, the court established "continuing jurisdiction * * * in order to determine * * * the location of any of a tribe's usual and accustomed fishing grounds not specifically determined" in its 1974 order. *Decision I*, 384 F. Supp. at 419. Following this directive, several additional tribes, including the Suquamish, joined the action as plaintiffs. See *United States* v. *Washington*, 459 F. Supp. 1020, 1039 (W.D. Wash. 1978) ("*Decision II*") (reporting several orders issued in 1974 and 1975), *aff'd*, 645 F.2d 749 (9th Cir. 1981). In 1975, the district court adjudicated the U&As for these tribes. *Decision II*, 459 F. Supp. at 1048-50.

Meanwhile, the State of Washington and non-tribal commercial fishers brought state and federal proceedings to challenge Judge Boldt's orders. After the State Supreme Court held that the State of Washington could not lawfully comply with the federal injunction and the Washington Department of Game "simply refused to comply," this Court granted certiorari, combining the state and federal

cases. *Fishing Vessel*, 443 U.S. at 673. The Court then substantially affirmed the injunctive relief ordered by Judge Boldt, with narrow exceptions that are not material here. *Id.* at 674.

C. Subsequent Litigation.

The orders establishing tribal U&As begot substantial litigation. Because the district court maintained continuing jurisdiction over the case, these disputes are brought as "sub-proceedings" to the original *United States* v. *Washington* action, which effectively are new lawsuits to enforce the underlying orders and associated treaty-based rights. See *Decision II*, 459 F. Supp. at 1037. See also App., *infra*, 18a n.11.[2] Among these sub-proceedings have been a series of inter-tribal disputes regarding fishing territories. See, *e.g.*, *United States* v. *Lummi Indian Tribe*, 235 F.3d 443 (9th Cir. 2000). Many of the tribes' U&As overlap, meaning that these tribes must share in the treaty entitlements to fish harvested at any particular location. See *Decision I*, 384 F. Supp. at 343, 410. As fishing resources have diminished and commercial competition increased, tribes have found themselves with a significant economic incentive to argue that neighboring tribes hold narrower U&As than those established by Judge

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[2] The district court docket for *United States* v. *Washington*, 2:70-cv-09213 (W.D. Wash.), contains more than 19,600 entries. Since 1983, at least twenty-two separate sub-proceedings have been initiated; the rulings terminating sub-proceedings are final, appealable judgments. See App., *infra*, 18a n.11; *United States*. v. *Muckleshoot Indian Tribe*, 235 F.3d 429, 432 n.1 (9th Cir. 2000). Over the life of the litigation, the case has been appealed to the Ninth Circuit on at least eighteen occasions. After Judge Boldt passed away in 1984, various district court judges have assumed responsibility for this ongoing litigation.

Boldt. See *United States* v. *Washington*, 573 F.3d 701, 704-05 (9th Cir. 2009).

In resolving these disputes that turn on the application of Judge Boldt's orders issued in the 1970s, the Ninth Circuit does not regard the language of the orders as dispositive. Instead, even when that language is unambiguous, the Ninth Circuit requires analysis of the record that was before Judge Boldt to determine whether he intended something other than what is expressed in the orders' plain language. See, *e.g.*, *Muckleshoot Tribe* v. *Lummi Indian Tribe*, 141 F.3d 1355, 1358 (9th Cir. 1998) ("*Muckleshoot I*"). In *United States* v. *Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000) ("*Muckleshoot III*"), the Ninth Circuit elaborated on this rule, explaining that, while "unambiguous text" in a federal judicial order "is certainly a factor to be considered" in interpreting that order, "it does not necessarily terminate the inquiry." The court reasoned that "there are no canons of construction for the interpretation of opinions" and that "[o]pinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis." *Ibid.* (citing *Julian Petroleum Corp.* v. *Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927), and *Marshall* v. *Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932)).

Thus, the Ninth Circuit concluded, "debate over whether the language of [Judge Boldt's orders] is unambiguous is largely misdirected, inasmuch as an analysis of the decision is necessary, whether the text is ambiguous or not." *Muckleshoot III*, 235 F.3d at 433. That is so, the Ninth Circuit concluded, because it is still necessary for the court applying the

order to determine whether "'*the court [issuing the order] intended something other than its apparent meaning.*'" *Ibid.* (quoting *Muckleshoot I*, 141 F.3d at 1359 (emphasis added by the court)).

D. This Proceeding.

1. This case is a dispute between the Suquamish and certain other tribes as to the scope of the Suquamish's U&A. In his 1975 order, Judge Boldt determined:

> The usual and accustomed fishing places of the Suquamish Tribe include the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.

Decision II, 459 F. Supp. at 1049, Finding of Fact No. 5 ("FF 5"). Judge Boldt defined Puget Sound as "'includ[ing] the Strait of Juan de Fuca and all saltwater areas inland therefrom.'" App., *infra*, 36a (quoting definition used in an exhibit that Judge Boldt expressly adopted as a finding of fact). For an illustrative map identifying these areas, see Appendix E. *Id.* at 57a.

In 2005, the Upper Skagit Indian Tribe ("Upper Skagit") initiated this action, Sub-proceeding No. 05-3, to determine whether the Suquamish's U&A includes portions of Saratoga Passage and Skagit Bay, waters of Puget Sound on the eastern side of Whidbey Island. See App., *infra*, 31a. The Swinomish Indian Tribal Community ("Swinomish") also filed a request for a determination, essentially joining in the request of the Upper Skagit and enlarging the area in dispute to include all of Saratoga Passage. *Ibid.*

The Suquamish responded that Saratoga Passage and Skagit Bay are within Judge Boldt's definition of "Puget Sound," "that this language is not ambiguous, and that it unambiguously includes the contested areas" within the Suquamish's U&A. *Id.* at 32a. The Upper Skagit and Swinomish replied that—notwithstanding the plain language of his order—Judge Boldt did not intend to include these waters within the Suquamish's U&A.

2. The district court granted summary judgment to the Upper Skagit and Swinomish. See App., *infra*, 31a-54a. The court first considered the plain language of Judge Boldt's 1975 order and found that, "[a]s Judge Boldt defined Puget Sound * * *, it includes the waters of * * * Saratoga Passage and Skagit Bay." *Id.* at 44a. See also *id.* at 37a (noting Judge Boldt's several "reference[s] to Puget Sound as a broad area encompassing all the saltwater areas inward from the entrance of the Strait of Juan de Fuca"); 38a ("this language necessarily subsumes the other bays and inlets, including the areas at issue here, into Puget Sound, as the term was used in this case"); 44a ("As Judge Boldt defined Puget Sound as the case area, it includes the waters of * * * Saratoga Passage and Skagit Bay."); 52a ("[T]he Court and the parties had a common understanding that the term 'Puget Sound' * * * include[es] all the bays and inlets, and specifically including Skagit Bay and Saratoga Passage."). Indeed, the Ninth Circuit later characterized the district court as having "held that Judge Boldt used the term Puget Sound unambiguously to refer to all the marine areas inward from the mouth of the Strait of Juan de Fuca." *Id.* at 19a.

The district court, however, reasoned that the unambiguous language of Judge Boldt's order "does

not end the inquiry." App., *infra*, 44a. Rather, "[u]nder the rules developed by the Ninth Circuit, the Court must look to the actual evidence that was before Judge Boldt to determine if it 'suggests that Judge Boldt *intended something other than this apparent meaning* when he wrote FF 5.'" *Ibid.* (emphasis added) (quoting *Muckleshoot I*, 141 F.3d at 1359). Thus, notwithstanding the plain language of the order, the court sought to determine whether there was evidence before Judge Boldt sufficient to prove that the Suquamish did in fact fish in Saratoga Passage and Skagit Bay during the 1850s, looking to "maps, fisheries reports, anthropological reports, and testimony." *Id.* at 52a. After considering this material, the court found dispositive what it labeled an "absence of evidence regarding Squamish [*sic*] fishing or travel through Saratoga Passage and Skagit Bay" (*id.* at 49a), which it took to mean "that Judge Boldt did not intend to include these areas in the Suquamish U&A." *Ibid.*

3. The court of appeals initially reversed. App., *infra*, 14a-30a. Writing for the panel, Judge Kleinfeld—like the district court—noted that under the Ninth Circuit's interpretive approach, the existence of unambiguous language in Judge Boldt's order could not alone be dispositive:

> Suquamish argues that the court should only clarify Judge Boldt's rulings after finding them ambiguous. This contention is foreclosed by our precedent. An analysis of the decision is necessary, *whether the text is unambiguous or not* * * *.

Id. at 19a (internal quotations & alterations omitted; emphasis in original). The Ninth Circuit rule thus "obligated" the court "to discern what a deceased

federal district judge intended when he adjudicated Suquamish's fishing grounds more than three decades ago." *Id.* at 30a.

The court nonetheless reversed. It noted that "Saratoga Passage and Skagit Bay are in the Puget Sound" between Vashon Island and the Fraser River. App., *infra*, 22a. And the court determined that "[b]oth the language that Judge Boldt used and the evidence before him, specifically the Lane Report, support an inference that he intended to include the disputed areas in Suquamish's territory." *Id.* at 25a. Granting summary judgment to the Suquamish, the court accordingly concluded that, in light of the undisputed facts, the Upper Skagit did not meet its burden of proving that Judge Boldt intended something other than the apparent meaning of his words: "it is at least as likely as not that Judge Boldt meant what he said." *Id.* at 29a.

4. The panel, over the dissent of Judge Kleinfeld, subsequently granted respondents' petition for rehearing, withdrew the court's initial opinion, and affirmed the district court's grant of summary judgment in favor of the Upper Skagit and Swinomish. App., *infra*, 1a-13a. Once again, the panel repeated the district court's finding that Judge Boldt's use of the term "'Puget Sound' * * * included the waters of Saratoga Passage and Skagit Bay" (*id.* at 6a), noting "Judge Boldt's unambiguous definition of 'Puget Sound.'" *Id.* at 8a. And once again, the panel rejected the Suquamish's argument that the unambiguous language controls, explaining that a departure from that language is required when "the record before Judge Boldt" or "additional evidence * * * if it sheds light on the understanding that Judge Boldt had of the geography at the time" suggests that Judge Boldt

"'intended something other than [the order's] apparent meaning.'" *Id.* at 9a. But this time, the panel found that to be the case, pointing particularly to what it thought to be the absence of evidence before Judge Boldt that the Suquamish had fished in the disputed areas at the relevant time. *Id.* at 7a-10a.

Judge Kleinfeld dissented. He complained that the Ninth Circuit's rule required the court to "engage[] in the odd activity of deciding what a long deceased judge thought was accurate history about what happened 150 years earlier. We cannot retry the case." App., *infra,* 12a. He added: "Continually revisiting Judge Boldt's decades-old opinions (and the limited record supporting them) in an attempt to discern what he thought the customs of multiple people were in the 1850's and earlier, besides being extremely burdensome and expensive, is a fundamentally futile undertaking. The truth is not knowable." *Id.* at 12a-13a. Instead, Judge Kleinfeld reasoned, "[t]he best way to determine what the judge thought is the language he used." *Id.* at 12a. And "the better reading of 'Puget Sound' is that it means 'Puget Sound.'" *Ibid.*

The Ninth Circuit denied the Suquamish's petition for rehearing en banc over Judge Kleinfeld's dissent. App., *infra*, 55a-56a.

REASONS FOR GRANTING THE PETITION

On the face of it, Judge Boldt's controlling, decades-old order disposes of the claim in this case: "the better reading of 'Puget Sound' is that it means 'Puget Sound.'" App., *infra,* 12a. The majority below did not disagree. But it nonetheless was compelled by the Ninth Circuit's interpretive rule to look behind the plain language of the order and attempt to

plumb the unexpressed intent of a long-deceased judge, relying on evidence considered by that judge 35 years ago.

This is not a sound basis on which to interpret and apply a court order. This Court said exactly that, recently and expressly, in *Travelers Indemnity*: "a court should enforce a court order, a public governmental act, according to its unambiguous terms." 129 S. Ct. at 2204. As the Court also recognized in *Travelers Indemnity*, other courts of appeals properly have applied that rule, rejecting the approach embraced by the Ninth Circuit in this case. Thus, in every other circuit to have considered the interpretive question here, the unambiguous language of a judicial order governs. The Ninth Circuit's departure from this otherwise uniformly applied rule should be unacceptable; identical judicial orders should not be subject to different methods of interpretation in different parts of the country.

There is good reason it is "black-letter law" that a court order should be enforced "according to its unambiguous terms." *Travelers Indem.*, 129 S. Ct. at 2204. Allowing dissatisfied litigants to look behind an order's plain language diminishes the force, and discourages precision in the formulation, of judicial orders. It invites continuing and repeated litigation. And it undermines the certainty and finality of judicial rulings, interfering with the reasonable and settled expectations of parties affected by court orders. This case itself illustrates the point: as Judge Kleinfeld observed, "I could be wrong, and today's majority could be wrong, but I am pretty sure that it is a mistake to reopen the matter without any more chance of being right." App., *infra*, 12a. Such an approach is "extremely burdensome,' "expensive,"

and "fundamentally futile." *Id.* at 13a. This Court should grant review and set aside the Ninth Circuit's aberrant rule.

I. THE PLAIN LANGUAGE OF AN UNAMBIGUOUS JUDICIAL ORDER SHOULD CONTROL.

1. To begin with, this is the rare example of a case where the court of appeals' decision is flatly inconsistent with a ruling of this Court. The language of the judicial order applied below is, in relevant part, unambiguous; the panel majority did not suggest otherwise. But the majority felt bound by the Ninth Circuit's interpretive rule to look beyond the plain language of the order and to search for other "evidence bearing on Judge Boldt's intent." App., *infra*, 11a. That the Ninth Circuit did, deconstructing Judge Boldt's ruling by pointing to what it regarded as an absence of "evidence in the record before Judge Boldt that the Suquamish fished or traveled in the waters on the eastern side of Whidbey island, particularly in Saratoga Passage or Skagit Bay." *Id.* at 9a. This supposed absence of evidence persuaded the Ninth Circuit majority that Judge Boldt "intended something other than [his order's] apparent meaning." *Id.* at 8a-9a.

The application of this interpretive rule was dispositive here. There can be little doubt that, if Judge Boldt's 1975 order were applied as written, the Suquamish would be entitled to treaty-based fishing rights in Saratoga Passage and Skagit Bay. The district court recognized that, "[a]s Judge Boldt defined Puget Sound * * * it includes * * * Saratoga Passage and Skagit Bay." App., *infra*, 44a. The Ninth Circuit majority agreed. See *id.* at 6a; see also *id.* at 57a. As the court recounted, "[t]he Suquamish main-

ly fault the district court for having engaged in a sufficiency of the evidence analysis *instead of accepting Judge Boldt's unambiguous definition of 'Puget Sound.'" Id.* at 8a (emphasis added). But the court rejected the Suquamish's position, finding that the district court "faithfully followed" circuit precedent by seeking to determine whether there was "evidence that suggests that the U&A is ambiguous *or* that the court intended something other than its apparent meaning." *Id.* at 8a-9a (alteration and internal quotation omitted; emphasis added). The court found the latter ground decisive here.

This Court, however, has rejected precisely that approach to the interpretation of judicial orders. In *Travelers Indemnity*, parties subject to a court order enjoining certain lawsuits argued that particular claims were not barred by the order, maintaining that the claims lay outside what the parties understood to be the scope of the order. See 129 S. Ct. at 2198-99, 2204. This Court recognized that the parties who contended that the intent of the order was more limited than the plain terms indicated "may well be right about that," noting that "there certainly are statements in the record that seem to support [the parties'] contention." *Id.* at 2004. Justice Stevens, in dissent, pointed to additional reasons to believe that the issuing court intended the order to be more limited than its plain language suggested. *Id.* at 2211-12.

"But be that as it may," the Court held,

> where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect. * * * If it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of

> the parties' subjective intent, see 11 R. Lord, Williston on Contracts § 30:4 (4th ed. 1999), it is all the clearer that *a court should enforce a court order, a public government act, according to its unambiguous terms.*

129 S. Ct. at 2204 (emphasis added).[3]

The Ninth Circuit should have applied this rule. In seeking rehearing of the decision below, the Suquamish specifically called to the Ninth Circuit's attention the inconsistency of its decision with *Travelers Indemnity*. See Pet. for Rehearing En Banc, at 8. Although Judge Kleinfeld dissented from the denial of rehearing, the panel took no steps to conform its decision with *Travelers Indemnity*, and the full Ninth Circuit declined to revisit the issue en banc. In these circumstances, the manifest inconsistency between the holding of the court of appeals and a decision of this Court warrants review. Indeed, the Ninth Circuit's decision so clearly departs from the guidance of *Travelers Indemnity* that the Court may wish to consider summary reversal of the decision below.

2. That is especially so because compelling reasons support the plain-meaning rule applied in *Travelers Indemnity*. Courts have long recognized that the best evidence of the intent of one who drafts a document that has legal force – be it a judge au-

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[3] Likewise, in construing consent decrees (another type of federal judgment, see Fed. R. Civ. P. 54(a)), the Court has held that the clear language of the decree must control. See *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971) ("[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it").

thoring an order, a legislature enacting a statute, or parties negotiating a contract—is the unambiguous meaning of the language selected. This commonsense rule is applied across a range of like circumstances.

The Court thus noted in *Travelers Indemnity* that this rule should be used to interpret "public governmental act[s]" generally. 129 S. Ct. at 2204. It is, of course, a staple tool of statutory construction "that, when the statutory language is plain, [a court] must enforce it according to its terms." *Jimenez* v. *Quarterman*, 129 S. Ct. 681, 685 (2009). See, *e.g.*, *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). Likewise, the Court has held that recourse to extrinsic evidence when interpreting a treaty is appropriate only in the face of ambiguity. See *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). And as the Court also noted in *Travelers Indemnity*, this rule is a centuries-old hornbook principle of contract interpretation. See, *e.g.*, *Richardson* v. *Hardwick*, 106 U.S. 252, 254 (1882); *Sprigg* v. *Bank of Mt. Pleasant*, 39 U.S. 201, 206 (1840).

The Ninth Circuit's departure from this long-standing method of construction is unjustified. In rejecting the plain-language rule as it applies to court orders, the Ninth Circuit reasoned that "judicial opinions are simply not statutes and the rules governing the interpretation of the two reflect this," as "[o]pinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis." *Muckleshook III*, 235 F.3d at 433. But that simply is not (or should not be) so.

To the contrary, as the First Circuit recently explained, "[d]istrict court orders are documents of considerable import. A district court speaks to the

parties and the court of appeals primarily through its orders." *Negron-Almeda* v. *Santiago*, 528 F.3d 15, 22 (1st Cir. 2008). Accordingly, "the phrasing of a court order is significant. When that phraseology is imprecise, there may be some play in the joints. * * * But when a court's order is clear and unambiguous, neither a party nor a reviewing court can disregard its plain language simply as a matter of guesswork or in an effort to suit interpretive convenience." *Id.* at 23 (internal quotation omitted). Thus, "to the extent that there [is] any room for doubt that [an] order meant exactly what it said, it [is] the burden of the doubters * * * to ask the district court in a timely fashion to clarify the scope of the order." *Id.* at 24. Failure to do so "estops" a party from "alleging the existence of a hidden ambiguity." *Ibid.* The Ninth Circuit accordingly erred in embracing a special rule that rests, at bottom, on a failure to respect the plain language of judicial orders.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE HOLDINGS OF OTHER COURTS OF APPEALS ON THE PROPER MEANS OF INTERPRETING A JUDICIAL ORDER.

Given that this Court regards it as a matter of "black-letter law" that the unambiguous language of a judicial order is controlling, it comes as no surprise that other courts of appeals have rejected the Ninth Circuit's interpretive approach. While the Ninth Circuit will examine extrinsic evidence of the issuing judge's intent to determine the meaning of even an unambiguous order, every other court to address the question has held that the unambiguous language *must* control. This conflict, on an important and recurring question of federal law, should be resolved.

1. As we have explained, when interpreting even an unambiguous judicial order, the Ninth Circuit requires a court to look behind the language of the order and examine the evidence originally presented to determine the intent of the issuing judge. The Ninth Circuit carefully considered and deliberately chose this interpretive rule. As noted above, the court opined that "judicial opinions are simply not statutes and the rules governing the interpretation of the two reflect this," that there generally "are no canons of construction for the interpretation of opinions," and that it is not expected that "each and every word" of a judicial order "may be the subject of searching analysis." *Muckleshoot III*, 235 F.3d at 433. The Ninth Circuit therefore regards as "largely misdirected" any "debate over whether the language of [an order] is unambiguous, * * * inasmuch as an analysis of the decision is necessary, whether the text is unambiguous or not," to determine whether "'*the court intended something other than its apparent meaning*.'" *Ibid.* (internal omitted; emphasis added by the court).

2. In contrast, every other court of appeals to address the question has rejected this approach and held that extrinsic evidence is irrelevant in these circumstances. There can be no doubt about the existence of this conflict: this Court in *Travelers Indemnity* cited decisions of the First and Second Circuits as standing for the proposition that, "where the plain terms of a court order unambiguously apply, * * * they are entitled to their effect." 129 S. Ct. at 2204 (citing *Negron-Almeda* 528 F.3d at 23, and *United States* v. *Spallone*, 399 F.3d 415, 421 (2d Cir. 2005)). If the Suquamish had litigated this dispute in these other circuits, they would have prevailed.

a. The First Circuit recently held that, "absent amendment or vacation, a court must carry out and enforce an order that is clear and unambiguous on its face, whether or not the inscribed language reflects the court's recollection of its actual intent." *Negron-Almeda*, 528 F.3d at 23. See *Travelers Indem.*, 129 S. Ct. at 2204 (quoting a portion of this language). As we have noted, the First Circuit's rule is that, "when a court's order is clear and unambiguous, neither a party nor a reviewing court can disregard its plain language." *Negron-Almeda*, 528 F.3d at 23. Thus, "unless and until a clear and unambiguous order is amended or vacated * * * a court must adopt, and give effect to [the order's] plain meaning." *Ibid* (bracketed material added by the court).

In *Negron-Almeda*, the court applied this rule to "distill the meaning" of a particular order. 528 F.3d at 22. One party, despite "conced[ing] that the language of the order is inhospitable" to its interpretation, sought to introduce evidence such as "the case law cited in the lead-up" to the original order as bearing on the issuing court's intent. *Id.* at 23. But the First Circuit rejected this attempt at rewriting the order's language. It held that where the order is "unambiguous[]" and written with "conspicuous clarity," a party's "grab-bag of random facts lacks force" (*ibid.*)—and that was so even though the same district court that initially issued the order stated that a departure from the order's plain language conformed with its initial intent. See *id.* at 20, 23.

This is a rule of long standing in the First Circuit. See *Alstom Caribe, Inc.* v. George *P. Reintjes Co.*, 484 F.3d 106, 115 (1st Cir. 2007) ("We cannot disregard express rulings simply as a matter of

guesswork or in an effort to suit interpretative convenience."); *In re Thinking Machs. Corp.*, 67 F.3d 1021, 1026 (1st Cir. 1995) ("Court orders are customarily important events in the life of a judicial proceeding; they are the primary means through which courts speak, and they should carry commensurate weight." (citation omitted)).

b. The Second Circuit likewise has explained, in language quoted by this Court in *Travelers Indemnity*, that "if a judgment is clear and unambiguous, a court must adopt, and give effect to, the plain meaning of the judgment." *Spallone*, 399 F.3d at 421 (internal quotation omitted). As the Second Circuit explained, this "limiting principle prohibits a court from altering a judgment that is clear on its face, *even if not reflective of the court's actual intent.*" *Ibid.* (emphasis added). Thus, when the language of a judicial order is clear, additional evidence of a court's intent is simply irrelevant to courts in the Second Circuit.

c. The Third Circuit similarly has held that "[c]ourt orders must ordinarily be interpreted by examination of only the 'four corners' of the document." *Ford Motor Co.* v. *Summit Motor Prods., Inc.*, 930 F.2d 277, 286 (3d Cir. 1991). There, in the context of a RICO action, the court was required to interpret the meaning of a more than 20-year-old divestiture order issued in an antitrust suit. *Id.* at 283-84. Only after concluding that the underlying order was "ambiguous" did the court consider evidence of the issuing court's intent. *Id.* at 287. See also *Richman Bros. Records, Inc.* v. *U.S. Sprint Commc'ns. Co.*, 953 F.2d 1431, 1438-39 (3d Cir. 1991) (applying *Ford Motor Co.*).

d. The Eleventh Circuit agrees that a district court may not revisit an unambiguous earlier judgment by purporting to "interpret" supposed ambiguity. See *Sec. & Exch. Comm'n* v. *Hermil, Inc.*, 838 F.2d 1151, 1153-54 (11th Cir. 1988). The court of appeals there held that there was "no ambiguity in the [initial] judgment, and therefore no basis for saying that in [its subsequent order] the district court was merely interpreting its original order." *Id.* at 1154. This was so even though the party seeking to depart from the plain language of the original order "point[ed] to a substantial and convincing amount of evidence" that its favored approach conformed to the initial intent of the order, and even though the district court itself "stated * * * that it had intended this result all along." *Ibid.* Because "[t]he court * * * did not draft the [original] order to reflect this intent, * * * the [subsequent] revision came too late" and the plain language of the order governed. *Ibid.*

e. The Fifth Circuit has reached the same conclusion. See *Dunlop* v. *Ledet's Foodliner of Larose, Inc.*, 509 F.2d 1387, 1389 (5th Cir. 1975) (declining to "search [the] record to clarify an unambiguous judgment"). See also *In re National Gypsum Co.*, 219 F.3d 478, 484 (5th Cir. 2000) (court will defer to trial court's interpretation of its own order only if the documents are "truly * * * ambiguous"). And although the Fourth Circuit evidently has not expressly addressed the standard for reviewing an unambiguous prior court order or judgment, district courts in that Circuit follow the majority rule. See *Spearman* v. *J & S Farms, Inc.*, 755 F. Supp. 137, 140 (D.S.C. 1990) ("A judgment which is clear and unambiguous must be given its plain meaning and consequent legal effect. * * * In construing the judgment,

general rules for the construction of written instruments are applicable. Thus, if the judgment is clear and unambiguous, this court must adopt, and give effect to, the plain meaning of the judgment.").

f. These and other courts of appeals also have applied this rule in the context of consent decrees, which are a form of "judgment." See Fed. R. Civ. P. 54(a). The Seventh Circuit, for example, holds that "where a decree is clear on its face, it is neither necessary nor appropriate to consider extrinsic evidence." *Ahern* v. *Bd. of Educ.*, 133 F.3d 975, 981 (7th Cir. 1998) (internal quotation and alteration omitted). The Fifth and Eleventh Circuits likewise have explained that they are "required to analyze" the meaning of a consent decree "by its language without resort to extrinsic considerations." *Eaton* v. *Courtaulds of N. Am., Inc.*, 578 F.2d 87, 90 (5th Cir. 1978). See, *e.g.*, *Lelsz* v. *Kavanagh*, 824 F.2d 372, 373-74 (5th Cir. 1987) ("[T]he scope of a consent decree must be discerned within its four corners." (internal quotation omitted)); *Roberts* v. *St. Regis Paper Co.*, 653 F.2d 166, 171 (5th Cir. 1981) ("[U]nless the decree is ambiguous, we must find the meaning of the decree in its language, without resort to extrinsic considerations."); *Sierra Club* v. *Meiburg*, 296 F.3d 1021, 1030 n.10 (11th Cir. 2002) (explaining that, "[g]iven the clarity of the consent decree," the court would "decline * * * invitations to consider any extrinsic evidence on the issue"); *United States* v. *Danube Carpet Mills, Inc.*, 737 F.2d 988, 993 (11th Cir. 1984) ("Reference to extrinsic evidence to construe a consent order is proper only where the language is ambiguous.").

Which rule the court applies when the parties dispute the meaning of a court order—either the

plain-language approach used by most courts, or the investigation into what the issuing judge "really meant" undertaken by the Ninth Circuit—will govern the nature of the inquiry undertaken by the court in all cases, and often will determine the outcome of the case, as it did here. This Court should resolve the conflict.

III. THE QUESTION IN THIS CASE IS A RECURRING ONE OF SUBSTANTIAL IMPORTANCE.

The question how to interpret existing judicial orders is one of substantial practical importance. It is a question that arises frequently, in the widest range of contexts. The cases affected are often ones of considerable significance in their own right, governing the continuing rights and obligations of both governments and private parties. Left uncorrected, the Ninth Circuit's approach accordingly would work mischief in many areas of law. Moreover, *United States* v. *Washington* itself implicates important, treaty-based rights of numerous Indian tribes, which have been settled in a series of complex and comprehensive court orders spanning four decades. Correction of the error below therefore will limit what otherwise is sure to be many new rounds of "extremely burdensome and expensive" litigation in an already exhaustively long set of proceedings. App., *infra*, 13a.

A. Judicial Orders Are Interpreted And Applied In A Wide Range Of Contexts.

Parties frequently contest the proper interpretation of past judicial orders and decrees in numerous areas of the law. Such issues often arise in institutional litigation, where parties seek injunctive relief

to guide future behavior. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265. They also are common in many areas where judicial orders are entered involving disputes between private parties. The question presented here will be involved in every such case.

Antitrust. In antitrust proceedings, the government often seeks injunctive relief that regulates the defendant's future conduct. The precise effect of these orders may be litigated years later. In *Ford Motor Co.*, 930 F.2d at 283-84, for example, the court interpreted the requirements of a two-decade old divestiture order that resolved an antitrust action.

Bankruptcy. Bankruptcy proceedings frequently involve orders regarding reorganization and receivership. Claimants in such proceedings may later challenge the scope of the court's order. See, *e.g.*, *In re Bernard L. Madoff Inv. Sec. LLC*, 413 B.R. 137, 144 (Bankr. S.D.N.Y. 2009) ("Courts have a duty to enforce their orders and ensure that all parties under their jurisdictions follow them."); *In re Mahoney*, 251 B.R. 748, 754 (Bankr. S.D. Fla. 2000) ("Where the language of a judgment is clear and unambiguous, the reviewing court must adopt, and give effect to the plain meaning of the judgment." (internal quotation omitted)); *In re Doty*, 129 B.R. 571, 588 (Bankr. N.D. Ind. 1991) (the meaning of unambiguous judgments "should be accepted at its face value" (internal quotation omitted)). This Court's decision in *Travelers Indemnity* involved such a case, addressing the meaning of a bankruptcy order issued almost 25 years earlier.

Civil Rights. In civil rights cases, courts are often required to construe injunctive relief contained in decades-old judgments. In *United States* v. *Georgia*, 171 F.3d 1344, 1348 (11th Cir. 1999), for example, the court examined the meaning of a twenty-six year old school desegregation order. See also, *e.g.*, *Ahern*, 133 F.3d at 980-82 (also interpreting orders issued in school desegregation case); *Capacchione* v. *Charlotte-Mecklenburg Sch.*, 57 F. Supp. 2d 228, 244 (W.D. N.C. 1999) (interpreting predecessor judge's twenty-nine year old standard for school desegregation).

Environmental. Similarly, injunctive orders or decrees often resolve actions brought pursuant to federal environmental statutes. This relief frequently becomes the subject of subsequent proceedings. See, *e.g.*, *Rumpke of Ind., Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1236-38 (7th Cir. 1997) (CERCLA). See also, *e.g.*, *Sierra Club*, 296 F.3d at 1030 (interpreting consent decree issued under the Clean Water Act).

Insurance. Parties to insurance contracts may obtain declaratory judgments adjudicating coverage rights under a policy, which may be the subject of later dispute. See, *e.g.*, *Sec. Mut. Cas. Co.* v. *Century Cas. Co.*, 621 F.2d 1062, 1063-64 (10th Cir. 1980).

Water rights. In locations where water is scarce and ownership contested, federal courts may enter orders adjudicating the allotment of water resources. These judgments often become the subject of subsequent enforcement proceedings, where the original court's intent is questioned. See, *e.g.*, *Kittitas Reclamation Dist.* v. *Sunnyside Valley Irrigation Dist.*, 626 F.2d 95 (9th Cir. 1980) (interpreting meaning of thirty-five year old consent decree).

In each of these areas of the law—as well as many others—courts frequently must interpret judicial orders, many of which are years or decades old. The question presented here accordingly arises with great frequency in a variety of settings. Conclusively resolving the proper way to construe past judicial orders will provide guidance, and minimize litigation, in all such cases.[4]

B. The Ninth Circuit's Rule Undermines Finality And Repose.

In addition, getting the interpretive rule correct is imperative because the Ninth Circuit's anomalous approach has significant, and harmful, practical consequences. The rule applied below makes it impossible for parties bound by a judicial order to rely on the order's plain language. That reality effectively deprives governing orders of certainty, interferes with planning by the parties, and ensures continued, burdensome litigation as those seeking to

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[4] That a judicial order is being applied by the judge who initially issued it should not matter to the analysis; as several courts of appeals have noted, the unambiguous language should control "whether or not [that] language reflects the court's recollection of its actual intent." *Negron-Almeda*, 528 F.3d at 23. See *Spallone*, 399 F.3d at 421; *Hermil*, 838 F.2d at 1154. But it is worth noting that the interpretive difficulties posed by the Ninth Circuit's rule are especially acute in cases, like this one, where an order is being applied by a judge who did not initially issue it. Because court orders may govern the parties' conduct for decades, that occurs with some frequency. See, *e.g.*, *Reed* v. *Rhodes*, 179 F.3d 453, 460 (6th Cir. 1999); *Gonzales* v. *Galvin*, 151 F.3d 526, 528, 530 & n.6 (6th Cir. 1998); *Kittitas Reclamation Dist.*, 626 F.2d 95; *Capacchione*, 57 F. Supp. 2d at 244. In such circumstances, as Judge Kleinfeld noted, attempting to discern the thoughts of the issuing judge "is a fundamentally futile undertaking." App., *infra*, 13a.

escape an order's explicit terms embark on a quest to uncover the issuing judge's supposed "real" intent. Left uncorrected, the Ninth Circuit's rule thus invites litigants to collaterally challenge the resolution of issues seemingly settled long ago by unambiguous judicial orders.

This approach undermines the usual rules that are intended to create an orderly and predictable process for parties to challenge judicial orders. A party has twenty-eight days after the entry of judgment to file a motion to "alter or amend" that judgment (Fed. R. Civ. P. 59(e)), and generally has thirty days after entry of judgment within which to appeal (Fed. R. App. P. 4(a)(1)(A)). But once final, an order is not subject to later challenge: "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938). "A fundamental precept of common-law adjudication * * * is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies.'" *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (alteration omitted) (quoting *S. Pac. R.R.* v. *United States*, 168 U.S. 1, 48-49 (1897)). *Travelers Indemnity* itself applied this principle, holding that issues resolved by a final judgment were not subject to collateral attack (129 S. Ct. at 2205) —and, of course, that this rule could not be circumvented through the device of recharacterizing the plain language of the original judgment.

The effect of the Ninth Circuit rule *requiring* examination of the original record and, if necessary, extrinsic evidence to determine the district court's intent when it initially issued an unambiguous order

necessarily undermines this essential principle of repose. Although the Ninth Circuit expresses its rule in terms of uncovering the issuing court's intent, the effect of the rule is far different: by directing the parties and the district court to review the record presented at the time the governing order was written, the rule calls into question the work of the issuing judge. If the later court disagrees with the language of the initial order or believes that the order was not supported by the evidence before the issuing judge (as the courts below appear to have concluded here), the later court is at liberty to declare that the issuing judge could not have intended the order to be applied as written. In this way, the Ninth Circuit rule permits relitigation in the guise of interpretation. And that result, in practical effect, undermines the rules of finality that are intended to "protect[] [parties] from the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action." *Montana*, 440 U.S. at 153-54.

This case is a prime example of the unfortunate effect of a rule that mandates review of the record underlying even unambiguous court orders. As required by circuit precedent, the parties sifted through the evidence available to Judge Boldt at the time of the 1975 order, including "maps, fisheries reports, anthropological reports, and testimony" (App., *infra*, 52a), and argued as to its proper interpretation. The courts below weighed and evaluated that material, ultimately concluding that there was an "absence of evidence regarding [Suquamish] fishing or travel through Saratoga Passage" (*id.* at 49a) and that, accordingly, "Judge Boldt did not intend to include these areas in the Suquamish U & A." *Ibid.* But as Judge Kleinfeld observed below,

"[c]ontinually revisiting Judge Boldt's opinions (and the limited record supporting them) in an attempt to discern what he thought the customs of multiple people were in 1850's and earlier, besides being extremely burdensome and expensive, is a fundamentally futile undertaking. The truth is not knowable." *Id.* at 12a-13a. This Court should determine whether the Ninth Circuit is correct in its view that such an approach is required.

C. The *United States* v. *Washington* Litigation Has Substantial Importance.

Finally, not only is the legal issue presented here a recurring one of great importance, this proceeding is *itself* one of considerable significance. The dispute here concerns the scope of treaty-based fishing rights held by certain Indian tribes. These rights have substantial financial, cultural, and historical value. The Court in *Fishing Vessel* repeatedly noted the "vital" importance of fishing rights to the tribes (443 U.S. at 664, 666, 676), as well as the "great economic value" of anadromous fish in the Pacific Northwest (*id.* at 664) and the central role of "this important treaty provision" in establishing those rights. *Id.* at 674. The relitigation whether the Suquamish have the right to fish in Skagit Bay and Saratoga Passage thus will have a significant practical impact on the affected tribes.

But beyond that, decision of the question presented would aid significantly in diminishing the burden of the massive and continuing litigation spawned by *United States* v. *Washington*. The Ninth Circuit itself has repeatedly recognized that "'[w]e cannot think of a more comprehensive and complex case than'" *United States* v. *Washington*. App., *infra*, 4a (quoting *United States* v. *Suquamish Indian*

Tribe, 901 F.2d 772, 775 (9th Cir. 1990)). As we have noted, the litigation has involved at least 22 separate sub-proceedings, 18 appeals to the Ninth Circuit, and almost 20,000 docket entries in the district court. Essentially "[a]ll of these supplemental proceedings require the interpretation of Judge Boldt's opinion." *Muckleshoot Indian Tribe* v. *Lummi Indian Nation*, 234 F.3d 1099, 1099 (9th Cir. 2000) (*Muckleshoot II*).

For this reason, the need for much of this litigation would be foreclosed, and any litigation that did proceed would be greatly simplified, if the Ninth Circuit applied the rule recognized everywhere else: that "[t]he best way to determine what the judge thought is the language he used." App., *infra*, 12a (Kleinfeld, J., dissenting). Such an approach would bring greatly increased clarity and repose to pending and future matters involving *United States* v. *Washington*. It would spare the tribes and other affected parties unwarranted expense. And it would conserve the substantial judicial resources that otherwise would be expended reviewing the decades-old record in an attempt to determine whether Judge Boldt really meant what he expressly said. For this reason as well, review of the decision below by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2010

APPENDICES

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UPPER SKAGIT INDIAN TRIBE,
Plaintiff-Appellee,

and

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF WASHINGTON,
Defendant,

and

SUQUAMISH INDIAN TRIBE,
Defendant-Appellant,

v.

Jamestown S'klallam Tribe;
Lower Elwha Klallam Tribe;
Lummi Indian Nation; Nisqually
Indian Tribe; Port Gamble
S'Klallam tribe; Skokomish
Indian Tribe; Tulalip Tribe,
Plaintiff-intervenors-Appellees,

Swinomish Indian Tribal Community,
Cross-claimant-Appellee.

No. 07-35061
D.C. Nos. CV-70-09213-RSM
SP-05-00003-RSM
ORDER AND OPINION

Appeal from the United States District Court for the Western District of Washington

Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted - October 21, 2008 Seattle, Washington

Filed January 5, 20100

Before: Diarmuid F. O'Scannlain, Pamela Ann Rymer and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Rymer; Dissent by Judge Kleinfeld

COUNSEL

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ORDER

The petition for rehearing, filed August 20, 2009, is GRANTED and the petition for rehearing en banc is denied as moot.

This court's opinion filed, August 6, 2009 and published at *Upper Skagit Tribe v. Washington*, 576 F.3d 920 (9th Cir. 2009), is hereby withdrawn. A new opinion is filed concurrently herewith.

OPINION

RYMER, Circuit Judge:

This case arises out of, and is a sub-proceeding of, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) ("*Decision I*"), where Judge Boldt determined the usual and accustomed fishing grounds ("U&A") for Puget Sound tribes. Invoking the district court's continuing jurisdiction, *id.* at 419, Upper Skagit Indian Tribe[1] filed a Request for Determination that Saratoga Passage and Skagit Bay on the eastern side of Whidbey Island are not within the Suquamish Tribe's U&A (Subproceeding 05-3). On cross-motions for summary judgment, the district court concluded that Judge Boldt did not intend to include those areas in Suquamish's U&A, and accordingly granted summary judgment for Upper Skagit. We affirm.

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[1] Jamestown S'Klallam and Port Gamble S'Klallam joined as plaintiff-intervenors, as did the Tulalip Tribes. Swinomish Indian Tribal Community filed a cross-Request for Determination to the same general effect as Upper Skagit's. For convenience, we refer to these parties collectively as Upper Skagit unless context requires otherwise.

I

As we previously said, "[w]e cannot think of a more comprehensive and complex case than this." *United States v. Suquamish Indian Tribe*, 901 F.2d 772, 775 (9th Cir. 1990). In short, Judge Boldt defined "usual and accustomed grounds and stations" as "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters." *Decision I*, 384 F. Supp. at 332; *United States v. Lummi Indian Tribe*, 235 F.3d 443, 445 (9th Cir. 2000) (quoting *Decision I*). The term "customarily" does not include "occasional and incidental" fishing or trolling incidental to travel. *Decision I*, 384 F. Supp. at 353. Tribes are entitled to take up to 50 percent of the harvested fish from runs passing through their off-reservation U&A grounds. *Id.* at 343.[2]

Judge Boldt determined Suquamish's U&A during supplemental proceedings on April 9-11, 1975. See *United States v. Washington*, 459 F. Supp. 1020, 1048-50 (W.D. Wash. 1978) ("*Decision II*"). The evidence consisted of the April 9 testimony and report of Dr. Barbara Lane, an expert for the United States on tribal identity, treaty status and fisheries for all of the tribes who intervened in the original proceedings in *Decision I*. She provided a map of Suquamish fishing sites, and her testimony also

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[2] We substantially affirmed *Decision I* in *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), and the Supreme Court upheld the decision with slight modification in *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

addressed a map attached to proposed Suquamish fishing regulations that outlined disputed areas of Suquamish's and other tribes' U&As. Based on this evidence, Judge Boldt ruled that the Suquamish had made a "prima facie" showing that its U&A fishing grounds were: "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal." Finding of Fact No. 5 (FF 5), *Decision II*, 459 F. Supp. at 1049.[3]

In this Subproceeding, Upper Skagit alleges that the Suquamish began fishing in the Subproceeding Area[4] for the first time in 2004. It seeks an order determining that the portion of Saratoga Passage from the Snatelum Point Line to the Greenbank Line and Skagit Bay to the Deception Pass bridge is not a U&A for the Suquamish. Upper Skagit argued in district court that there was no evidence before

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[3] In May 1985 the Suquamish filed a Request for Determination to determine their U&A on the eastern side of Puget Sound. *See Suquamish*, 901 F.2d at 774. We noted that "[a]t the time of the Treaty of Point Elliott, [the Suquamish] did not fish in those areas, which were the usual and accustomed fishing places of the Duwamish." *Id.* The Suquamish unsuccessfully argued that they were successors in interest to the Duwamish. We referred to the Suquamish's U&A as being the "west side of Puget Sound" whereas the Duwamish's was on the eastern side. *Id.* at 774, 776 n.9.

[4] The Upper Skagit originally defined the Subproceeding Area as Saratoga Passage, from the Greenbank Line north to the Snatelum Point Line, and Skagit Bay. The Swinomish cross-request defines the case area for their purposes as Catch Reporting Area 24C. Thus, as the district court described it, the case area encompasses that portion of Saratoga Passage within Catch Reporting Area 24C, plus Skagit Bay.

Judge Boldt in 1975 that Suquamish's U&A included those areas. Suquamish, on the other hand, contended that Judge Boldt's definition of its U&A unambiguously included the contested areas.

The district court adhered to a two-step procedure in keeping with our decisions in *Muckleshoot Tribe v. Lummi Indian Tribe*, 141 F.3d 1355 (9th Cir. 1998) ("*Muckleshoot I*"), *Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F.3d 1099 (9th Cir. 2000) ("*Muckleshoot II*"), and *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) ("*Muckleshoot III*"). First, it determined that Upper Skagit had the burden to offer evidence that FF 5 was ambiguous, or that Judge Boldt intended something other than its apparent meaning (i.e., all salt waters of Puget Sound). Second, if the evidence, including contemporaneous understanding of the extent of "the marine waters of Puget Sound," showed that "Puget Sound" as used in the Suquamish U&A included the Subproceeding Area, Upper Skagit had the burden to show that there was no evidence before Judge Boldt that the Suquamish fished on the east side of Whidbey Island or traveled there in route to the San Juans and the Fraser River area.

Applying this analysis, the court found that "Puget Sound" as defined by Judge Boldt included the waters of Saratoga Passage and Skagit Bay.[5] Howev-

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[5] Among other things, this was based on FF 164 in *Decision I*, adopting the definition of "Puget Sound" in the "Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsula Drainage Area of Western Washington," 384 F. Supp. at 382-83, which included "the Strait of Juan de Fuca and all saltwater areas inland therefrom"; Judge Boldt's several

er, based on the actual evidence that was before Judge Boldt, the district court in this Subproceeding concluded that the judge meant something other than this in FF 5 given that nothing in the record showed the Suquamish fished on the east side of Whidbey Island, or traveled through there on their way up to the San Juans and the Fraser River area. The court noted that Judge Boldt relied heavily on Dr. Lane's reports and testimony. While she did say that the Suquamish traveled widely by canoe (as was "normal" for "all Indians in Western Washington"), Lane provided no evidence that the tribe fished or traveled in Saratoga Passage or Skagit Bay.[6] Her report listed places where the Suquamish traditionally took fish, but neither Saratoga Passage nor Skagit Bay was among them.[7] And when asked about a map delineating areas of Puget Sound where the Suquamish traveled, Lane referred only to areas that omitted Saratoga Passage and Skagit Bay. The

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references to "Puget Sound" as a broad area; and maps indicating that "Puget Sound" encompassed a very broad region.

[6] Geographically, Saratoga Passage and Skagit Bay are nearly enclosed or inland waters to the east of Whidbey Island. The southern entrance to these waters includes Possession Sound and the mouth of the Snohomish River, where the Suquamish were known to fish seasonally. The northern exits through Deception Pass and Swinomish Slough are narrow and restricted; both areas were controlled by the Swinomish at treaty times.

[7] The places Dr. Lane listed where the Suquamish fished for salmon, herring, steelhead, halibut, and shellfish by trolling, spearing, nets, or traps were: Apple Cove Point, Hood Canal, Dye's Inlet, Liberty Bay, the head of Sinclair Inlet, Skunk Bay, Union River and Curley Creek, Blake Island, Jefferson Head, Point to Point, Rich's Passage, Orchard Point, Indianola, Ross Point, Miller's Bay, Agate Passage, and the area between Chico and Erland's point.

Suquamish pointed out that they fished at the mouth of the Snohomish River, which is on the eastern side of Whidbey Island, but this area is well south of the Subproceeding Area and was described by Lane as a fall and winter fishing site at the mouth of a river, which was "separate and distinct from the spring and summer travels up to the Fraser River." Further, the district court noted the Suquamish's position that they maintained close relations with the Skagit and Snohomish people, who had fishing camps on Whidbey and Camano Islands, but thought it would be speculative to conclude this meant that the Suquamish must necessarily have camped and fished there as well. Finally, the court found that Judge Boldt's description of the Suquamish U&A tracks nearly verbatim the language in Dr. Lane's report, demonstrating the judge's intent to conform the Suquamish U&A only to those areas documented by Lane.

The Suquamish timely appealed.

II

The Suquamish mainly fault the district court for having engaged in a sufficiency of the evidence analysis instead of accepting Judge Boldt's unambiguous definition of "Puget Sound." In our view, however, the court faithfully followed the *Muckleshoot* construct. As *Muckleshoot III* indicates, whether the language of one of Judge Boldt's findings is ambiguous is a factor in ascertaining the judge's intent, but not a dispositive one, because it is necessary to understand the findings "in light of the facts of the case." 235 F.3d at 433 (internal quotation marks omitted). This means that, as the district court held here, the tribe asserting ambiguity in a U&A determination must offer " 'evidence that

suggests that [the U&A] is ambiguous or that the court intended something other than its apparent meaning.'" *Id.* (quoting *Muckleshoot I*, 141 F.3d at 1358) (emphasis added in *Muckleshoot III* omitted). The determination is to be based on the record before Judge Boldt as of April 18, 1975, when he established the Suquamish's U&A, but may also include additional evidence if it sheds light on the understanding that Judge Boldt had of the geography at the time. *Muckleshoot II*, 234 F.3d at 1100 (citing *Muckleshoot I*, 141 F.3d at 1360).

We agree with the district court that Upper Skagit met this burden. There is no evidence in the record before Judge Boldt that the Suquamish fished or traveled in the waters on the eastern side of Whidbey Island, particularly in Saratoga Passage or Skagit Bay. In addition to Dr. Lane's testimony and analysis upon which Judge Boldt relied heavily, the district court also reviewed the April 1975 hearing transcript for the day after Lane testified to ascertain the judge's intent. On that occasion the state challenged the sufficiency of the Suquamish's prima facie showing that its U&A was as broad as claimed. Rejecting that challenge, Judge Boldt ruled from the bench:

> The Court finds that a prima facie showing has been made that travel and fishing of the Suquamish Tribe through the north Sound areas; *that is areas one and two as designated by the state*, was frequent and also regular, not merely occasional, and the application of the Suquamish for such a ruling is granted.

Transcript of proceedings, April 10, 1975 (emphasis added). The currently disputed Subproceeding Area

is not in Areas One or Two, but in Area Four. Although Lane's Report showed that several areas on the west shores of Area Four comprised Suquamish's on-reservation territory and fishing locations,[8] there was no evidence from Lane or otherwise that the *east* shores of Area Four, as well as Skagit Bay and Saratoga Passage, were part of Suquamish's U&A.[9]

In addition, Judge Boldt used specific geographic anchor points in describing other tribes' U&As. *See, e.g., Decision I*, 384 F. Supp. at 360, 371 (Lummi and Puyallup U&As); *Decision II*, 459 F. Supp. at 1049 (Nooksack, Swinomish and Tulalip U&As). From this it is reasonable to infer that when he intended to include an area, it was specifically named in the U&A. In Suquamish's case, the only inclusive geo-

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[8] The district court was either mistaken, or misspoke, when it said that the area designated as Area Four was not mentioned. Area Four was discussed in Dr. Lane's Report, but the discussion pertained to the west shores and not to that part of Area Four which includes Skagit Bay and Saratoga Passage.

[9] Given that the decision in this Subproceeding must be made on the record that was before Judge Boldt, augmented only by evidence of contemporaneous understanding of ambiguous terms — which the district court here gave the parties an opportunity to do — a trial on the merits would reveal no additional relevant facts. In these circumstances, the district judge, who is also the trier of fact, may resolve conflicting inferences and evaluate the evidence to determine Judge Boldt's intent. *See, e.g., Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-24 (5th Cir. 1978); *In re First Capital Holdings Corp.*, 179 B.R. 902, 904-05 (Bankr. C.D. Cal. 1995) (Tashima, J.) (so holding). Nor, given the lack of *any* evidence of Suquamish fishing or travel in these areas, let alone fishing that was more than "incidental" or "occasional," is there any basis for supposing that "it is just as likely" that Saratoga Passage and Skagit Bay were intended to be included as that they were not. *Cf. Lummi*, 235 F.3d at 452.

graphic anchor points for the term "Puget Sound" are the "Haro and Rosario Straits," which do not include or delineate the Subproceeding Area. That Judge Boldt neglected to include Skagit Bay and Saratoga Passage in the Suquamish's U&A supports our conclusion that he did not intend for them to be included. *See Lummi*, 235 F.3d at 451-52.

The district court's conclusion does not have the effect of re-adjudicating Suquamish's U&A or diminishing it, as the Tribe contends, for the Suquamish never had the right to fish in those areas in the first place. Nor is it necessary, as the Suquamish suggests, to include the Subproceeding Area in its U&A in order to reconcile Judge Boldt's determination of the Suquamish and Swinomish U&As in his April 18, 1975 order. The Swinomish's U&A used the phrase "marine areas of northern Puget Sound," but it also used geographic anchors delineating an area that specifically included Saratoga Passage and Skagit Bay. As the district court (and the Suquamish) recognized, the inquiry properly focuses on individual U&As, and the fact that Judge Boldt defined "Puget Sound" in one instance as including Skagit Bay and Saratoga Passage does not mean that references to "Puget Sound" in other U&As always include those same areas. If anything, the judge's inclusion of reference points in one U&A but not in another indicates a lack of intent to include them generically. Finally, the Suquamish maintain that the district court erred in considering its post-1975 fishing regulations, however as we read the court's order, it merely referred to the scope of those regulations as an aside to the Suquamish's understanding of its own U&A — not as evidence bearing on Judge Boldt's intent in determining that U&A.

Accordingly, we agree with the district court that Judge Boldt did not intend for Suquamish's U&A to include Skagit Bay and Saratoga Passage.[10]

AFFIRMED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

In my view, the better reading of "Puget Sound" is that it means "Puget Sound." We are engaged in the odd activity of deciding what a long deceased judge thought was accurate history about what happened 150 years earlier. We cannot retry the case. The best way to determine what the judge thought is the language he used. He said "Puget Sound." True, a good case could have been made under the evidence for something narrower, something along the lines the majority describes. There was not much evidence, not much more than a report by an anthropologist about what she thought had been the various tribal patterns 150 years before, based on extremely sparse evidence available to her. I laid out my view more fully in the earlier decision in this case, *Upper Skagit Tribe v. Washington*, 576 F.3d 920 (9th Cir. 2009). I could be wrong, and today's majority could be wrong, but I am pretty sure that it is a mistake to reopen the matter without any more chance of being right.

Continually revisiting Judge Boldt's decades-old opinions (and the limited record supporting them) in an attempt to discern what he thought the customs of multiple people were in the 1850's and earlier,

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[10] Given this disposition, we do not need to reach Upper Skagit's further argument that Suquamish is judicially estopped from arguing that the term "Puget Sound" is ambiguous.

besides being extremely burdensome and expensive, is a fundamentally futile undertaking. The truth is not knowable. "This exercise is not law, and is not a reliable way to find facts, so it is hard to see why courts are doing it and how it could be preferable to the Indian tribes working some dispute resolution system out for themselves."[1] That we now reverse ourselves in this iteration of the case underscores the futility of our pursuit moving forward and demonstrates why Judge Boldt's 1974 decree and its implementation process, continuing this case in perpetuity, should be brought to an end.[2]

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[1] *U.S. v. Washington*, 573 F.3d 701, 710-11 (9th Cir. 2009).

[2] *See id.*

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UPPER SKAGIT TRIBE,
Plaintiff-Appellee,

and

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF WASHINGTON,
Defendant,

and

SUQUAMISH INDIAN TRIBE,
Defendant-Appellant,

v.

Jamestown S'Klallam Tribe; Lower Elwha Klallam Tribe; Lummi Indian Nation; Nisqually Indian Tribe; Port Gamble S'Klallam Tribe; Skokomish Indian Tribe; Tulalip Tribe,
Plaintiff-intervenors-Appellees,

Swinomish Indian Tribal Community,
Cross-claimant-Appellee.

No. 07-35061
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CV-70-09213-RSM
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OPINION

Appeal from the United States District Court for the Western District of Washington Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted

October 21, 2008—Seattle, Washington

Filed August 6, 2009

Before: Diarmuid F. O'Scannlain, Pamela Ann Rymer, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

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Lauren P. Rasmussen (briefed), Law Offices of Lauren P. Rasmussen, Seattle, Washington, for appellees Port Gamble S'Klallam and Jamestown S'Klallam Tribes.

Mason D. Morisset (briefed), Morisset, Schlosser, Jozwiak & McGaw, Seattle, Washington, for appellee The Tulalip Tribes.

OPINION

KLEINFELD, Circuit Judge:

This case concerns the geographical scope of the Suquamish Indian Tribe's treaty right fishing grounds in the Puget Sound.

I. Background.

In 1850s, the United States signed a series of treaties with the tribes[1] of the Pacific Northwest.[2] In the treaties, "[t]he Tribes ceded their aboriginal lands to the United States for settlement, receiving in exchange exclusive title to defined lands, free medical care, schools, occupational training, and annuity payments."[3]

The treaties also reserved to the Tribes the "right of taking fish at usual and accustomed grounds and stations . . . ."[4] The term "usual and accustomed grounds and stations" includes "every fishing location where members of a tribe customarily fished

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[1] *See United States v. Washington*, 384 F. Supp. 312, 355 (W.D. Wash. 1974) ("No formal political structure had been created by the Indians living in the Puget Sound area at the time of initial contact with the United States Government. Governor Stevens . . . deliberately created political entities for purposes of delegating responsibilities and negotiating treaties. In creating these entities Governor Stevens named many chiefs and subchiefs.") [hereinafter *Decision I*].

[2] *See, e.g.*, Treaty of Point No Point (Jan. 26, 1855), 12 Stat. 933 (1859); Treaty of Point Elliott (Jan. 22, 1855), 12 Stat. 927 (1859). *See generally Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661-69 (1979).

[3] *United States v. Washington*, 157 F.3d 630, 638 (9th Cir. 1998). For a general overview of the history of the treaties and the ensuing fishing rights litigation, see *id.* at 638-41.

[4] Treaty of Point Elliott, 12 Stat. at 928.

from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters."[5]

In 1970, the United States initiated the underlying case, *United States v. Washington*, against the State of Washington in order to vindicate the tribes' treaty right to fish. As part of his lengthy and detailed opinions, Judge Boldt determined the various tribes' usual and accustomed fishing grounds and stations.[6] He stated that he was particularly aided in his determinations by the "authoritative and reliable summaries of relevant aspects of Indian life" prepared by Dr. Barbara Lane.[7]

As relevant to this case, Judge Boldt determined that:

> The usual and accustomed fishing places of the Suquamish Tribe include the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River and including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.[8]

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[5] *Decision I*, 384 F. Supp. at 332.

[6] *Id.* at 359-82; *see also United States v. Washington*, 459 F. Supp. 1020, 1049, 1059-60 (W.D. Wash. 1978) [hereinafter *Decision II*].

[7] *Decision I*, 384 F. Supp. at 350; *see also United States v. Suquamish Indian Tribe*, 901 F.2d 772, 777 & n.13 (9th Cir. 1990) (noting Judge Boldt's reliance on Dr. Lane).

[8] *Decision II*, 459 F. Supp. at 1049.

This conclusion was based on Dr. Lane's report. Her report indicated that the Suquamish customarily fished at the mouths of the Duwamish and Snohomish Rivers[9] in the fall and winter, and in wider areas in the spring and summer. She also noted that an October 1827 journal entry indicated that the Suquamish had traveled all the way north to the Fraser River and Fort Langley in what is now British Columbia.[10] Dr. Lane reported that "the Suquamish regularly travelled through the San Juan Islands and to the Fraser river . . . . It is likely that one of the reasons for travel was to harvest fish."

Almost thirty years after Judge Boldt reviewed Dr. Lane's report and made the initial determination of Suquamish's territory, the tribe changed its fishing patterns to include Saratoga Passage and Skagit Bay. The Upper Skagit Tribe then initiated this case by filing a request for determination[11] that the Suquamish were fishing outside of their adjudicated grounds. Both Upper Skagit and Suquamish moved for summary judgment. The relevant facts are undisputed and set forth above; the parties only dispute the inferences to be drawn from those facts.

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[9] Both rivers are on the east side of the Puget Sound. The Duwamish empties into Elliott Bay near Seattle. The Snohomish empties into Port Gardner Bay near Everett.

[10] The Fraser River empties into the Strait of Georgia near Vancouver.

[11] Requests for determination are similar to a complaint. They are the mechanism by which a party may invoke the continuing jurisdiction of the court in *United States v. Washington. See Decision I*, 384 F. Supp. at 419. Such requests begin new subproceedings in the original case. The judgment at the end of subproceedings are final judgments appealable under 28 U.S.C. § 1291.

The district court granted summary judgment to Upper Skagit, finding that it had met its burden of demonstrating that Judge Boldt did not intend to include these areas in Suquamish's traditional fishing grounds. The court reached this conclusion even though it held that Judge Boldt used the term Puget Sound unambiguously to refer to all the marine areas inward from the mouth of the Strait of Juan de Fuca. Suquamish timely appeals.

II. Analysis.

We review summary judgment de novo, viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party.[12] Circuit precedent dictates that our task is to determine whether Judge Boldt intended the Suquamish to have treaty fishing rights in Saratoga Passage and Skagit Bay, rather than rely on his words alone.[13]

A. Ambiguity.

[1] Suquamish argues that the court should only clarify Judge Boldt's rulings after finding them ambiguous. This contention is foreclosed by our precedent. "[A]n analysis of the decision is necessary, *whether the text is unambiguous or not*, in order to understand [findings] 'in light of the facts of the case.' "[14] Ambiguity thus is not a prerequisite for

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[12] *Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 784 (9th Cir. 2007).

[13] *Muckleshoot Indian Tribe v. Lummi Indian Tribe*, 141 F.3d 1355, 1359 (9th Cir. 1998) [hereinafter *Muckleshoot I*].

[14] *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000) (emphasis added) [hereinafter *Muckleshoot III*]. *See also Muckleshoot I*, 141 F.3d at 1359 ("Swinomish offered no evidence that suggests that FF 6 is ambiguous *or* that the court

clarifying the geographical scope of tribal fishing grounds. Nor, however, is it irrelevant. Instead, it "is certainly a factor to be considered" in determining Judge Boldt's intent.[15] We have previously held Judge Boldt's use of the term Puget Sound to be ambiguous.[16] But the question in this case is not whether Judge Boldt generally used Puget Sound ambiguously. The question is whether he intended this specific use of Puget Sound to include Saratoga Passage and Skagit Bay. He did.

[2] Judge Boldt used the term Puget Sound broadly. He defined it as including the Strait of Juan de Fuca and all saltwater areas inland. But Judge Boldt's use of Puget Sound is ambiguous with regard to the Hood Canal and the Straits of Georgia and Juan de Fuca — waters at its edges.[17] Judge Boldt had described Puget Sound as distinct from those waterways. Upper Skagit did not and cannot, however, point to an instance where Judge Boldt used Puget Sound in a way that excluded Saratoga Passage and Skagit Bay, waters at its center.

[3] The district court correctly concluded that "in every instance in 1975 where Judge Boldt did state a definition for Puget Sound, it is a broad one which necessarily includes both Saratoga Passage and Skagit Bay." This clear meaning must be taken into account in determining Judge Boldt's intent.[18]

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intended something other than its apparent meaning when it rendered *Decision I*.") (emphasis added).

[15] *Muckleshoot III*, 235 F.3d at 433.

[16] *Id.*; *see also United States v. Lummi Indian Tribe*, 235 F.3d 443, 451-52 (9th Cir. 2000).

[17] *Lummi Indian Tribe*, 235 F.3d at 451-52.

[18] *Muckleshoot III*, 235 F.3d at 433.

B. Burden of proof.

Summary judgment is appropriate against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[19] Determining who bears what burden of proof is key to deciding this appeal.

[4] At issue in an original territorial determination is whether there is sufficient evidence to show that disputed waters were part of a tribe's usual and accustomed grounds.[20] The tribe claiming territory bears the burden of proof.[21] At issue in a proceeding to clarify a previous territorial determination is what Judge Boldt intended by his description of a tribe's territory.[22] The tribe claiming Judge Boldt intended something other than his apparent meaning bears the burden of proof.[23]

[5] The burden of proof is especially important given the evidence relevant to the clarification proceeding. We have held that the relevant facts are the "evidence that was put before Judge Boldt."[24] In other words, "the palpable facts are substantially

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[19] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[20] *United States v. Lummi Indian Tribe*, 841 F.2d 317, 318 (9th Cir. 1988).

[21] *Id.*

[22] *Muckleshoot III*, 235 F.3d at 433.

[23] *Muckleshoot I*, 141 F.3d at 1358-59.

[24] *United States v. Lummi Indian Tribe*, 235 F.3d 443, 450 (9th Cir. 2000).

undisputed."[25] It is only the inferences that can be drawn from those facts which are disputed. If the evidence before Judge Boldt equally supports contradictory inferences about his intent, the party challenging the apparent meaning of his original determination cannot meet its burden of proof.[26]

C. Merits.

Suquamish's adjudicated usual and accustomed grounds include "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River."[27] Saratoga Passage and Skagit Bay are in the Puget Sound between these two points. Upper Skagit therefore has the burden of proving that Judge Boldt intended not to include these waters, contrary to the apparent meaning of his words.

Suquamish has little evidence of a traditional presence in these two specific locations. The district court erred in finding that lack of evidence fatal, rather that putting the burden of proof on Upper Skagit and viewing the inferences from the evidence in the light most favorable to Suquamish. The district court also made factual errors in reaching its judgment. When all reasonable inferences are drawn in favor of Suquamish, it is at least as likely as not that Judge Boldt intended to include Saratoga Passage and Skagit Bay in the tribe's territory. Summary judgment therefore should be awarded to

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[25] *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528, 531 (9th Cir. 1985).

[26] *Lummi Indian Tribe*, 235 F.3d at 452 ("This argument fails because . . . . it is *just as likely* that this area was intended to be included as that it was not.") (emphasis added).

[27] *Decision II*, 459 F. Supp. at 1049.

Suquamish because Upper Skagit cannot meet its burden of proof on undisputed facts.[28]

i. Factual errors.

The district court emphasized that Dr. Lane's testimony did not refer to Area 4 on a map attached to proposed fishing regulations discussed during the 1975 proceeding. It also stated that the "fall and winter fishery [at the mouth of the Snohomish River] was described by Dr. Lane as separate and distinct from the spring and summer travels up to the Fraser River." These conclusions are mistaken.

[6] Dr. Lane's testimony did refer to Area 4. The Suquamish live in Area 4. She testified that the map at page 22 of her report, documenting sites within Suquamish territory where they were accustomed to fishing, depicted locations south of Areas 1 and 2. The only location south of Areas 1 and 2 on the map is Area 4. This error is important because Saratoga Passage and Skagit Bay are in Area 4. The district court relied on the purported lack of testimony regarding Area 4 to conclude that Judge Boldt did not intend to include those locations in Suquamish's territory.

[7] Dr. Lane also did not separate the fishing at the mouth of the Snohomish from the trips to the Fraser River by limiting the latter to the spring or summer. The evidence she relied on shows that the Suquamish were at Fort Langley in *October* of 1827. In other words, they visited the Fraser River area in

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[28] *See Braxton-Secret*, 769 F.2d at 531 (holding that summary judgement on intent is permissible if the facts are undisputed).

the fall as well as in the spring and summer.[29] Additionally, it is reasonable to infer that the Suquamish would return from a fall trip to the Fraser River by stopping at the mouth of the Snohomish River to gather fish because they would not be able to gather enough on the west side of the Sound upon their return.[30]

[8] This error is important because the natural route from the mouth of the Snohomish River (where Dr. Lane reported that the Suquamish were accustomed to fishing), through the Rosario Strait (where Judge Boldt recognized a Suquamish usual and accustomed fishing ground), to the Fraser River (another Suquamish usual and accustomed fishing ground) goes directly through Saratoga Passage and Skagit Bay.[31] Thus, the facts before Judge Boldt make it at least as likely as not that he intended to

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[29] Dr. Lane testified that a trip from Port Madison to the San Juans would take one day. It would be no more than another day from the San Juans to the Fraser River and Fort Langley. The testimony before Judge Boldt supports the conclusion that the entire trip would take two days. Judge Craig heard different evidence in 1983. *See United States v. Washington*, 626 F. Supp. 1405, 1529 (W.D. Wash. 1985) (noting Dr. Lane's testimony that *a round trip* from the mouth of the Snohomish River to the Fraser River would have taken two to four weeks). The difference is immaterial, because a trip that arrived in October would still begin and end in fall and because Judge Boldt's intent in 1975 controls.

[30] Dr. Lane's report and testimony show that the Suquamish were dependent on fishing on the east side of the Puget Sound in the fall and winter.

[31] *Cf. Lummi Indian Tribe*, 235 F.3d at 452 ("If one starts at the mouth of the Fraser River . . . and travels past Orcas and San Juan Islands . . . it is natural to proceed through Admiralty Inlet . . . .").

include Saratoga Passage and Skagit Bay in Suquamish's treaty fishing grounds.

ii. Inferences favoring Suquamish.

[9] Both the language that Judge Boldt used and the evidence before him, specifically the Lane Report, support an inference that he intended to include the disputed areas in Suquamish's territory. The language Judge Boldt used to describe Suquamish territory is different from that he used to describe the territory of most tribes. Judge Boldt routinely provided specific geographical definitions as to their boundaries, and specifically identified bays, straits, and island areas that he intended to include. Judge Boldt did not do so in Suquamish's determination. He included the entire Puget Sound from Vashon Island to the Fraser River. That Judge Boldt did not follow his pattern and delimit Suquamish's boundaries suggests that he intended the boundaries not to be limited.

We are aware of two other territorial determinations in which Judge Boldt used the term Puget Sound without tying it to some geographical anchor — the territory of the Muckleshoot[32] and the Lummi[33] tribes. In the case of both tribes, however, Judge

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[32] *Decision I*, 384 F. Supp. at 367 ("Muckleshoot Indians had usual and accustomed fishing places primarily at locations on the upper Puyallup, the Carbon, Struck, White, Green, Cedar and Black rivers . . . and *secondarily* in the saltwater of Puget Sound.") (emphasis added).

[33] *Id.* at 360 ("[T]he usual and accustomed fishing places of the Lummi Indians at treaty times included the marine areas of the *Northern* Puget Sound from the Fraser River south to the present environs of Seattle, and particularly Bellingham Bay.") (emphasis added).

Boldt did use some limiting language — either "secondarily" or "Northern," respectively. We have heard appeals regarding both of these determinations. In the case of the Muckleshoot, we determined that the evidence before Judge Boldt demonstrated that the phrase "secondarily in the saltwater of the Puget Sound" was limited to the saltwater immediately adjacent to Muckleshoot's freshwater fishery.[34] In the case of the Lummi, we determined that the "Northern Puget Sound" included the west side of Whidbey Island in the absence of evidence to the contrary.[35] We did find that "Northern Puget Sound" excluded the Strait of Juan de Fuca and the Hood Canal because Judge Boldt had used those terms as distinct from Puget Sound elsewhere in his decision.[36] Upper Skagit must show a similar implied limitation.

Upper Skagit notes that Possession Sound was not specifically included in the determination of Suquamish's territory, even though it was in the case of the Tulalip tribe. This silence, however, does not support an inference against Suquamish. It is unquestioned that the Suquamish have a right to fish in Useless Bay, on the west side of Whidbey Island, even though that Bay is not specifically listed in Suquamish's territory and is in Tulalip's. Additionally, Possession Sound lies immediately adjacent to the mouth of the Snohomish River, and was thus described as a traditional Suquamish fishing location in Dr. Lane's report.

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[34] *Muckleshoot III*, 235 F.3d at 434-35.

[35] *Lummi Indian Tribe*, 235 F.3d at 452.

[36] *Id.* at 451-52.

[10] Upper Skagit also emphasizes the fact that Suquamish's territory does not include an eastern border. We need not decide whether this argument is correct.[37] Determining whether Judge Boldt intended to include specific marine waters within the Suquamish's territory calls for a case by case examination of the facts to determine whether Judge Boldt "intended something other than [his] apparent meaning."[38] We conclude that it is at least as likely as not that Judge Boldt intended to include Saratoga Passage and Skagit Bay because he had elsewhere identified those waters as being within "the marine waters of the Puget Sound,"[39] and because they lie on the natural route between two traditional Suquamish fisheries.

[11] Upper Skagit's third contention is that *United States v. Suquamish Indian Tribe*[40] controls this case. In *Suquamish Indian Tribe*, Suquamish attempted to exercise fishing rights on the freshwa-

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[37] One plausible border of "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River" is the land bordering the marine waters.

[38] *Muckleshoot I*, 141 F.3d at 1359.

[39] *See Decision II*, 459 F. Supp. at 1049 ¶ 6 ("The usual and accustomed fishing places of the Swinomish Tribal Community include . . . the marine areas of the northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island."). It is unquestioned that Saratoga Passage and Skagit Bay are within these marine areas "includ[ed]" within the "northern Puget Sound." *See also id.* at 1059 (including Saratoga Passage in the "usual and accustomed *marine* fishing areas of the Tulalip Tribes of Washington") (emphasis added).

[40] 901 F.2d 772 (9th Cir. 1990).

ter river systems to the "*east* of the Puget Sound" as the successor in interest to the Duwamish tribe.[41] We held that the Suquamish had "usual and accustomed fishing places in several areas in the west side of Puget Sound" and were "not entitled to exercise fishing rights on the east side of Puget Sound."[42] Such language, however, "must be read in the light of the facts before [the court]."[43] The court in *Suquamish Indian Tribe* was only confronted with question of whether the Suquamish were successors in interest to the Duwamish.[44] The Suquamish had abandoned any independent claim arising out of its own treaty time practices to the waters at issue, so our decision necessarily did not address the question of whether the Suquamish had an independent entitlement to fish there. Additionally, because *Suquamish Indian Tribe* dealt with the rights of the Suquamish to fish in freshwater river systems to the "*east* of the Puget Sound," the decision does not speak to whether the Suquamish have fishing rights in Saratoga Passage or Skagit Bay, waters *within* the Puget Sound.

[12] Finally, Upper Skagit argues that Dr. Lane's report on the Swinomish supports the conclusion that Judge Boldt intended to exclude Saratoga Passage and Skagit Bay from Suquamish's territory. They base this argument on the fact that Dr. Lane said that certain constricted waterways bordering

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[41] *Id.* at 774 & n.2, 775 (9th Cir. 1990) (emphasis added).

[42] *Id.* at 774, 778.

[43] *Muckleshoot III*, 235 F.3d at 433 (quoting *Julian Petroleum Corp. v. Courtney Petroleum Co.*, 22 F.2d 360, 362 (9th Cir. 1927)).

[44] *Suquamish Indian Tribe*, 901 F.2d at 775.

Saratoga Passage and Skagit Bay were controlled by the Swinomish. This argument is without merit. The fact that one tribe controls a territory does not imply the absence of fishing there by another tribe.[45] Indeed, the Suquamish have a treaty reserved fishing right in the Hood Canal, a territory controlled by the Skokomish.[46]

[13] We conclude that it is at least as likely as not that Judge Boldt meant what he said; the Suquamish treaty territory "include[s] the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River." This broad, unlimited fishery is what Dr. Lane described in her report and testimony. Dr. Lane stated that marine fisheries "are far more difficult to delimit than fresh waters." She repeatedly underlined that her report did not, and could not, list all of the usual and accustomed fishing locations of the Suquamish. She noted that the Suquamish had more limited resources in their home area than most tribes, and thus had to travel more extensively to fish.

[14] Dr. Lane said that she had no documentary evidence that the Suquamish fished in the San Juan Islands, but nonetheless found it likely that they did so. Judge Boldt agreed, deciding in the absence of

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[45] *See Decision I*, 384 F. Supp. at 332 (defining "usual and accustomed" as including locations "whether or not other tribes then also fished in the same waters"); *cf. United States v. Skokomish Indian Tribe*, 764 F.2d 670, 672 (9th Cir. 1985) (holding that a primary right claim could be litigated separately from a territorial determination).

[46] *See Decision III*, 626 F. Supp. at 1491; *see also Decision II*, 459 F. Supp. at 1039 ¶ 7 (recognizing the Swinomish's right to fish in Hale Passage, a territory controlled by the Lummi).

any specific evidence that the Haro and Rosario Straits were part of the Suquamish traditional fishing grounds. This demonstrates a lack of specific evidence would not have precluded Judge Boldt from including Skagit Bay and Saratoga Passage in Suquamish's territory.

III. Conclusion.

We are obligated to discern what a deceased federal district judge intended when he adjudicated Suquamish's fishing grounds more than three decades ago. And that district judge attempted to determine the location of the tribe's fishing grounds more than three quarters of a century earlier, despite the paucity of any very reliable evidence. Thus we are compelled to make legal determinations based on grossly inadequate foundations. But for now there seems to be no preferable alternative. We therefore **REVERSE** the judgment of the district court and **REMAND** for the entry of summary judgment in favor of Suquamish. All pending motions are dismissed as moot.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants.

CASE NO. CV 9213
Subproceeding No. 05-3

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

This subproceeding was initiated as a Request for Determination ("Request") filed by the Upper Skagit Indian Tribe ("Upper Skagit"), asking the Court to determine that certain areas known as Saratoga Passage and Skagit Bay, on the eastern side of Whidbey Island, are not within the usual and accustomed fishing area ("U & A") of the Suquamish Indian Tribe ("Suquamish") as it was defined in *U.S. v. Washington*, 459 F. Supp. 1020 (1978). A Cross-Request for Determination was filed, with leave of Court, by the Swinomish Indian Tribal Community ("Swinomish"), essentially joining in the Request of the Upper Skagit.[1] The Suquamish filed an Answer

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[1] The Upper Skagit originally defined the case area as Saratoga Passage, from the Greenbank Line north to the Snatelum Point Line, and Skagit Bay. The Swinomish cross-request defines the case area for their purposes as Catch Reporting Area 24C. The case area, then, encompasses that portion of Saratoga Passage within Catch Reporting Area 24C, plus Skagit Bay (Catch Reporting Area 24A). For convenience, this case area will

opposing both Requests. The matter is now before the Court for consideration of summary judgment motions filed by the three parties. Oral argument was heard on December 12, 2006, and the arguments and memoranda of the parties, and other Tribes who appeared as interested parties, have been fully considered. As the three motions argue the same points and issues, they shall be discussed together.

BACKGROUND

In 1975, in the language that lies at the heart of this dispute, U.S. District Court Judge George Boldt described the U & A of the Suquamish as

> the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.

Finding of Fact # 5 ("FF 5"), *U.S. v. Washington*, 459 F. Supp. 1020, 1049 (1978). The Upper Skagit and Swinomish assert in their separate Requests for Determination that this language is ambiguous as to certain waters lying on the eastern side of Whidbey Island, known as Saratoga Passage and Skagit Bay. They ask for a determination that the Suquamish U & A does not include these areas. The Suquamish, in answering the Request, contend that this language is not ambiguous, and that it unambiguously includes the contested areas.

The Court has ruled previously that there is sufficient ambiguity surrounding Judge Boldt's use of the term "Puget Sound" in describing the Suquamish

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simply be referred to interchangeably as Saratoga Passage and Skagit Bay, or as the "subproceeding area."

U & A to require clarification, thus allowing this subproceeeding to go forward. Dkt. # 43, pp 2-3; Dkt. # 71, n. 2. In a later Order, the Court set out a two-step procedure for reaching an understanding of Judge Boldt's intent. Referring to prior decisions of the Ninth Circuit Court of Appeals known as *Muckleshoot I* (*Muckleshoot Indian Tribe, et al, v. Lummi Indian Tribe*, 141 F. 3d 1355 (9th Cir. 1998)), *Muckleshoot II* (*Muckleshoot Indian Tribe v. Lummi Indian Nation*, 234 F. 3d 1099 (9th Cir. 2000)), and *Muckleshoot III* (*Puyallup Indian Tribe, et al., v. Muckleshoot Indian Tribe*, 235 F. 3d 429 (9th Cir. 2000)), the Court stated,

> These rulings inform this Court's decision on the motion to compel, as they define the scope of discovery in this matter. The burden in this subproceeding is on the requesting parties—the Upper Skagit and the Swinomish Tribal Community—to offer evidence that FF 5 is ambiguous, or that Judge Boldt "intended something other than its apparent meaning." *Id.* [citing to *Muckleshoot I*, 141 F. 3d at 1359.] Since the apparent meaning of the phrase "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits. . . ." is in dispute here, it must be determined by the Court. **The relevant evidence on this issue is evidence which indicates the contemporary understanding of the extent of "the marine waters of Puget Sound. . . ", which will "shed light on the understanding that Judge Boldt had of the geography at the time."** *Muckleshoot I*, 141 F. 3d at 1360; Muckleshoot II, 234 F. 3d at 1100. This may

> be provided by supplementation of the record, at the appropriate time, with declarations of geography experts. *Id.* Such evidence may be offered by the parties to "enable the district court to interpret the decree in specific geographic terms." *Muckleshoot I*, 141 F. 3d at 1360.
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> Should the evidence show that the common understanding of the term "Puget Sound" in 1974 included Saratoga Passage and Skagit Bay, the Upper Skagit or Swinomish Tribe must produce evidence that suggests that Judge Boldt intended something other than this apparent meaning when he wrote FF 5. *Muckleshoot I*, 141 F. 3d at 1359. **The evidence that is relevant to Judge Boldt's intent comprises "the entire record before the issuing court and the findings of fact [which] may be referenced in determining what was decided."** *Muckleshoot I*, 141 F. 3d at 1359.

Dkt. # 71 (emphasis added).

ANALYSIS

A. Ambiguity and Apparent Meaning

The first step, as set forth above, is to determine whether Judge Boldt's language is actually ambiguous. The Skagit and Swinomish assert that it is; the Suquamish contend that it is not. The Skagit and Swinomish counter that Suquamish should be estopped from asserting unambiguity, because they have in the past, in other subproceedings, argued that the term **is** ambiguous.

As the Court has stated previously, it is not the meaning of "Puget Sound" that is at issue here, but

rather its use by Judge Boldt in describing that portion of Puget Sound that constitutes the Suquamish U & A. That is, the term must be viewed in context: "the marine waters of Puget Sound from the tip of Vashon Island to the mouth of the Fraser River."

Black's Dictionary defines "ambiguity" as:

> Doubtfulness; doubleness of meaning. Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument. Want of clearness or definiteness; difficult to comprehend or distinguish; of doubtful import.
>
> . . . .
>
> Ambiguity of language is to be distinguished from unintelligibility and inaccuracy, for words cannot be said to be ambiguous unless their signification seems doubtful and uncertain to persons of competent skill and knowledge to understand them. . . . . It is *latent* where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings, as where a description apparently plain and unambiguous is shown to fit different pieces of property. A *patent* ambiguity is that which appears on the face of the instrument, and arises from the defective, obscure, or insensible language used.

Black's Law Dictionary, 5th ed., abridged, p. 41.

The Upper Skagit and Swinomish assert that the Court has already determined that Judge Boldt's language in describing the Suquamish U & A is ambiguous, and that such determination is the law of the case. However, the Court's previous ruling was not that the language was ambiguous, but rather that there was sufficient ambiguity "surrounding" Judge Boldt's language to justify clarification. While a latent ambiguity may have arisen later from various judges' and parties' imprecise use or differing understanding of the term "Puget Sound", it is the possible ambiguity in Judge Boldt's use of the term in 1975 that is at issue here.

In support of their contention that the language is not ambiguous, the Suquamish point to various places in the record where "Puget Sound" was actually defined by the Court. Specifically, Judge Boldt expressly adopted the definition of Puget Sound set forth in the "Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the Puget Sound and Olympic Peninsula Drainage Area of Western Washington", Exhibit JX-2a from the original *U.S. v. Washington* proceedings. That definition states: "As used in this report (except where the context clearly indicates otherwise) the term 'Puget Sound' includes the Strait of Juan de Fuca and **all saltwater areas inland therefrom**, . . . " Ex. JX-2a, p. i. (emphasis added). Judge Boldt expressly adopted this definition in his Findings of Fact in *Washington I*. Referring to the facts set forth in the report, he stated, "The contents of said report are hereby incorporated by reference as Findings of Fact herein." *Washington I*, 384 F. Supp. 312, 338 (W.D. Wash. 1974). This became Finding of Fact 164. *Id.* The contents of the report necessarily include the definitions.

The Skagit and Swinomish attempt to minimize the significance of this report by characterizing it as simply a fisheries management tool. However, this case arose out of fisheries management in Washington State, and tribal participation therein. Judge Boldt's understanding and use of the term "Puget Sound" would necessarily have been shaped by the fisheries reports and regulations that were under discussion at that time. It was therefore reasonable for the Court to consider and adopt the terminology used in fisheries management in discussing the case area.

This was not Judge Boldt's only reference to Puget Sound as a broad area encompassing all the saltwater areas inward from the entrance to the Strait of Juan de Fuca. This same broad definition was used on defining the case area in Conclusion of Law # 7:

> This case is limited to the claimed treaty-secured off-reservation fishing rights of the Plaintiff tribes as they apply to areas of the Western District of Washington within the watershed of Puget Sound and the Olympic Peninsula north of Grays Harbor, and in the adjacent offshore waters which are within the jurisdiction of the State of Washington.

U.S. v. Washington, 384 F. Supp. at 400. This language is taken verbatim from ¶ 5 of the Final Pretrial Order ("PTO"), Dkt. # 353, p. 5. This PTO was signed by all the parties to the case at that time, including the Upper Skagit, and approved by Judge Boldt

The parties' and the Court's common understanding of the extent of Puget Sound is indicated once again later in the PTO:

> Each of the Plaintiff tribes has usual and accustomed fishing places within the area described in paragraph 5 supra, including, among others, the waters of Puget Sound, Strait of Juan de Fuca, off-shore marine waters, the Nisqually River, the Puyallup River and Commencement Bay, the White River, the Green-Duwamish River, Lake Washington, Cedar River, Stillaguamish River, Sauk River, Skagit River, the Nooksack River, the waters of Hood Canal and the rivers flowing into said Canal, the Hoko River, the Quilayute River and its tributaries, and the Hoh River.

Final Pretrial Order ¶7-14, Dkt. # 353, p. 122. In designating only the Strait of Juan de Fuca and Hood Canal as separate areas, this language necessarily subsumes the other bays and inlets, including the areas at issue here, into Puget Sound, as the term was used in this case.[2]

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[2] The Court has ruled previously that this subproceeding will not address the western boundary of the Suquamish U & A, and therefore quotes these various definitions without making any finding as to whether the Strait of Juan de Fuca is included within "Puget Sound" as that term was used by Judge Boldt in the Suquamish U & A. However, the Ninth Circuit Court of Appeals has ruled previously, with respect to the Lummi U & A, that "[i]t is clear that Judge Boldt viewed Puget Sound and the Strait of Juan de Fuca as two distinct regions, with the Strait lying to the west of the Sound." *U.S. v. Lummi Indian Tribe*, 235 F. 3d 443, 451-52 (9th Cir. 2000).

The Court notes that the very maps used by the parties, admitted as exhibits by the Court on April 10, 1975 in the herring fisheries proceedings, also indicate a very broad region as Puget Sound. The maps themselves are National Oceanic and Atmospheric Administration ("NOAA") nautical maps with separate designations for each bay and inlet. Exhibit JX-3, JX-4. However, written by the parties in large letters on each map are the designations "Central and Southern Puget Sound" (Exhibit JX-3) and "Northern Puget Sound" (Exhibit JX-4). Thus, the map labeled by NOAA as "Strait of Georgia and Strait of Juan de Fuca" is designated by the parties as Northern Puget Sound. Exhibit JX-4. Similarly, the map labeled by NOAA as depicting "Admiralty Inlet and Puget Sound" is designated by the parties as Central and Southern Puget Sound. These handwritten designations on these maps are specific to this case, and indicate that the terms used and understood by the parties and the Court in the April, 1975 proceedings were Southern, Central, and Northern Puget Sound, rather than the NOAA designation of separate bays and inlets. The handwritten labels on these maps are thus highly significant to an understanding of Judge Bolt's use of the term "Puget Sound" during the 1975 proceedings.

These definitions, maps, and references support the conclusion that in 1975 the parties and the Court had a common understanding of Puget Sound as the case area, encompassing all the saltwater areas inward from the mouth of the Strait of Juan de Fuca. Indeed, Judge Boldt so stated in September 1975, five months after the ruling at issue here, in addressing the coho salmon fishery:

> As used in this Order the term "Puget Sound", when referring to the waters of origin or the place of salmon harvest, includes all the marine waters of Washington inland from the mouth of the Strait of Juan de Fuca (Tatoosh Island) together with the freshwater streams and lakes draining into such ma rine waters.

Order dated September 13, 1975, Dkt. # 1381. The Skagit and Swinomish assert that the language in this Order may not be considered, because the Court has limited the evidence under consideration in this subproceeding to that which was before the Court in April of 1975. However, this cited Order is not "evidence" within the meaning of that limiting rule, and it may therefore be considered as yet another indication of Judge Boldt's understanding, in 1975, of the extent of Puget Sound for the purposes of this case. As noted, in every instance in 1975 where Judge Boldt did state a definition for Puget Sound, it is a broad one which necessarily includes both Saratoga Passage and Skagit Bay.

Indeed, that conclusion is the only logical one, in light of Judge Boldt's description, in the very paragraph following the Suquamish U & A description, of the U & A of the Swinomish:

> The usual and accustomed fishing places of the Swinomish Tribal Community include the Skagit River and its tributaries, the Samish River and its tributaries and the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress, and the San Juan Islands, and includ-

> ing Bellingham Bay and Hale Passage adjacent to Lummi Island.

Finding of Fact # 6, *U. S. v. Washington*, 459 F. Supp. at 1049. This description, issued the same day and in the same Order as the Suquamish U & A, necessarily includes Skagit Bay and Saratoga Passage as within the "marine waters of northern Puget Sound", and within the U & A of the Swinomish.

Earlier, the Court invited the parties, pursuant to direction given in *Muckleshoot I*, to supplement the record, if appropriate, with declarations of geography experts in order to aid the Court in interpreting the language of the Suquamish U & A in specific geographic terms. Dkt. # 71, citing *Muckleshoot I*, 141 F. 3d at 1360. In light of the definitions in the record itself, and the maps known to be used by the Court as cited above, the Court now deems it unnecessary and inappropriate to turn to extrinsic evidence in order to fathom Judge Boldt's meaning. This is particularly so in view of the lack of any evidence that Judge Boldt consulted a geography expert for definitions of the geographical terms he used; instead it appears that the terms were defined by the fisheries consultants.

Even if the Court were to consider the extrinsic evidence offered, and could find it relevant to Judge Boldt's understanding, it would find that the experts' opinions here are not based upon sufficient facts and data, and do not adequately reflect the application of scientific methods to the facts of this case. F.R.Evid. 702. The Upper Skagit and Swinomish experts Richard Hart and Theresa Trebon (both of whom are historians, not geography experts) examined historical maps, journals, dictionaries, atlases, and other sources. They both noted that the meaning of "Puget

Sound" has changed over the years, from the original naming by Captain George Vancouver of the area at the southernmost end of the waterway. They both advanced the opinion that in 1975, as indicated on contemporary maps and charts, the term was generally used to describe the waters from the southern end up to (but not including) Admiralty Inlet. This opinion is clearly incompatible with Judge Boldt's own language in describing the Suquamish and Swinomish U & A's, which viewed Puget Sound as extending all the way north to the mouth of the Fraser River. The historians' opinions must therefore be disregarded as useless in shedding light on Judge Boldt's understanding of the extent of Puget Sound.

Moreover, it appears that neither historian consulted the official United States Geological Survey ("USGS") definition of Puget Sound, which would have been a highly reliable source to consult, and more precise than maps.[3] The Suquamish earlier asked the Court to take judicial notice of this official USGS definition of Puget Sound:

> Bay, with numerous channels and branches, [which] extends 144 km S from the Strait of Juan de Fuca to Olympia; the N boundary is formed, at its main entrance, by a line between Point Wilson on the Olympic Peninsula and Partridge on Whidbey Island; at a

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[3] In viewing maps and charts presented in this subproceeding, the Court finds maps to be an imprecise indicator of the boundaries of water areas. When bays and inlets are labeled on the map, it cannot be determined whether they are designated as parts of a greater whole (Puget Sound), or as separate areas which are not part of the whole. A written description with set boundaries is more informative on the question of the boundaries of a body of water.

> second entrance, by a line between West Point on Whidbey Island, Deception Island, and Rosario Head on Fidalgo Island; at a third entrance, the S end of Swinomish Channel between Fidalgo Island and McGlinn Island.

U.S. Department of the Interior, *USGS Geographic Names Information System*, quoted at Dkt. # 6, p. 12. This "official" USGS definition of Puget Sound includes Saratoga Passage and Skagit Bay, which lie just south of the second- and third-named entrances. However, it appears that this definition was adopted in 1979, and no copy of the earlier version, adopted in 1961, has been presented to the Court. Therefore, the Court cites this definition here only as a basis for disregarding the experts' opinions as insufficiently grounded in facts and data.

Similarly, it appears that neither historian consulted the Washington Administrative Code, which in 1975 codified many of the tribal fishing regulations, area by area, and could have shed some meaningful light on the question. Washington Administrative Code ("WAC") 220-47-001 *et seq.* Indeed, the Exhibit JX-2a definition, adopted by Judge Boldt, mirrored the definition stated in these regulations:

> The term "Puget Sound" shall be construed to include all the waters of Puget Sound outside the mouth of any river or stream including the Strait of Juan de Fuca, Georgia Strait, and all bays and inlets thereof.

WAC 220-16-210 (adopted 1969). Copies of certain regulations, namely WAC 220-47-206 through 220-47-268, defining the boundaries of various Puget Sound fishing areas, were provided to the Court by

the Upper Skagit, in support of their motion. Declaration of David Hawkins, Dkt. # 144 Exhibit C, pp. 14-19. The definition of Puget Sound applicable to these regulations, quoted above, was not provided. However, the parties agreed with the Court at oral argument that the Court may take judicial notice of the WACs. Here, the Court does so only for the purpose of pointing out deficiencies in the facts and resources researched by the two experts.

The Suquamish also presented the declaration of an expert, geographer Dr. Jon Kimerling. The Skagit in their reply asked the Court to strike Dr. Kimerling's opinion because he was identified only as a rebuttal witness, not in the original designation of experts. The Suquamish did not file a surreply to oppose the motion to strike. The Court therefore grants the motion to strike those portions of Dr. Kimerling's report which offer direct, as opposed to rebuttal, testimony.

Based on the discussion above, the Court finds that Judge Boldt demonstrated his understanding of the extent of Puget Sound by defining it in the record, and it is not appropriate to resort to extrinsic evidence to determine his meaning. As Judge Boldt defined Puget Sound as the case area, it includes the waters of of Saratoga Passage and Skagit Bay.

B. Judge Boldt's Intent

The determination that Judge Boldt in 1975 defined the term "Puget Sound" broadly, to include the disputed area here, does not end the inquiry. Under the rules developed by the Ninth Circuit, the Court must look to the actual evidence that was before Judge Boldt to determine if it "suggests that Judge Boldt intended something other than this apparent meaning when he wrote FF 5." *Muckleshoot I*, 141 F.

3d at 1359. In this inquiry, the burden is on the Upper Skagit and the Swinomish to demonstrate that there was no evidence before Judge Boldt that the Suquamish fished on the east side of Whidbey Island, or traveled through there on their way up to the San Juans and the Fraser River area.

Both this Court and the Ninth Circuit Court of Appeals have noted on several occasions that Judge Boldt relied heavily on the reports and testimony of anthropologist Dr. Barbara Lane in determining the U & A's of various tribes. *Muckleshoot I*, 141 F. 3d at 1359 (Dr. Lane's report was cited and heavily relied upon by Judge Boldt in his decision); *Muckleshoot III*, 235 F. 3d at 437 (Judge Boldt specifically noted that Dr. Lane's testimony prevails over that of expert Dr. Riley in the event of a conflict).

Dr. Lane's report on the Suquamish is titled "Identity, Treaty Status and Fisheries of the Suquamish Tribe of the Fort Madison Reservation" ("Report"). It was admitted as an exhibit on April 9, 1975. Dr. Lane testified in that day's proceedings, and the transcript of her testimony appears in the record at Docket # 7268 ("Transcript"). In both her report and her testimony, Dr. Lane characterized the Suquamish as a people who traveled widely by canoe, ranging as far north as the mouth of the Fraser River. She also stated that "[i]t was normal for all the Indians in western Washington to travel extensively either harvesting resources or visiting in-laws, . . . visiting for social occasions such as potlatches, weddings, feasts . . . or inter-community ceremonials or celebrations." Transcript, p. 48.

In the section of her report devoted to fisheries, Dr. Lane stated that the Suquamish fished for fall and winter salmon at the mouths of the Duwamish

and Snohomish Rivers, and in the "adjacent marine areas." Report, p. 15. In the spring and summer, they traveled by canoe as far north as Fort Langley on the Fraser River. *Id.* Dr. Lane stated,

> In my opinion, the evidence that the Suquamish travelled [sic] to the Fraser river [sic] in pre-treaty times documents their capability to travel widely over the marine waters in what are now known as the Strait of Juan de Fuca and Haro and Rosario Straits. According to oral tradition, the Suquamish regularly travelled through the San Juan Islands and to the Fraser river.
>
> The Fort Langley journal documents that the Suquamish did travel to the Fraser river. It is my opinion that the Suquamish undoubtedly would have fished the marine waters along the way as they travelled. It is likely that one of the reasons for travel was to harvest fish. The Suquamish travelled to Whidbey Island to fish and undoubtedly used other marine areas as well.

Report, p. 16. Dr. Lane also mentioned seasonal camps for smoke-curing fish on Bainbridge Island. *Id.*

The Report then listed the following places where the Suquamish traditionally took fish (salmon, herring, steelhead, halibut, and shellfish), by trolling. spearing, nets, or traps: Apple Cove Point, Hood Canal, Dye's Inlet, Liberty Bay, the head of Sinclair Inlet, Skunk Bay, Union River and Curley Creek, Blake Island, Jefferson Head, Point to Point, Rich's Passage, Orchard Point, Indianola, Ross Point, Miller's Bay, Agate Passage, and the area between

Chico and Erland's Point. Report, p. 19-20. This list was accompanied in the Report by a map indicating the above-named fishing places, described as being within Suquamish territory. Report, p. 20. 22. In her testimony, Dr. Lane clarified that the places marked on this map, all on the western side of Puget Sound, were sites within Suquamish territory, and did not indicate other areas where they may have traveled to fish. Transcript, p. 57.

At the April 9, 1975 hearing, Dr. Lane was questioned at length about the travels of the Suquamish. She affirmatively stated that they did travel through the San Juan Islands to the Fraser River. Transcript. p. 49. When questioned specifically about fishing in the area of the San Juan Islands, Birch Bay, and up to the Fraser River, she stated that she could not specifically cite to any documentation regarding Suquamish fishing for herring there, but that

> it's entirely likely that they fished for whatever was available as they were traveling through those waters and that they visited those waters regularly as a usual and accustomed matter in order to fish and to do other things.

Transcript, p. 52.

Upon Dr. Lane's re-cross examination, the discussion turned to a map that accompanied the Suquamish April 3, 1975 proposed fishing regulations. A copy of this map appears as an attachment to the Declaration of James Janetta, Dkt. # 146, p. 74. The map divides greater Puget Sound into numbered areas, clearly separated by lines drawn on the map. Area 1 includes the San Juan Islands, south about halfway down Whidbey Island, and the Strait of

Juan de Fuca. Area 2 lies entirely above the San Juan Islands, extending to the Canadian border. Area 3 encompasses Samish Bay and Bellingham Bay. Area 4 includes the very south-eastern end of the Strait of Juan de Fuca, plus Admiralty Inlet, lower Puget Sound, Saratoga Passage, and Skagit Bay. *Id.* Referring to this map, attorney Paul Solomon for the Department of Game questioned Dr. Lane. The following colloquy occurred:

> Q. And looking at their map attached, here, what has been described as Area Number 2, is this the area, roughly speaking, that Mr. Stay has asked you about, the Strait of Juan de Fuca, Haro Strait, and whatnot?
>
> A. I think he has asked me about what is labeled 1 and 2 on that map.
>
> Q. Both areas 1 and 2. That's what your comments pertain to?
>
> A. Well, I am speaking about the San Juan Island area, what is marked Number 1 there, and then 2.
>
> . . . .
>
> Q. Now, your report on the Suquamish notes that they traveled from their regular area up north as far as the Fraser River, which would cover areas 1 and 2 on this.
>
> A. Part of the Area 1
>
> Q. Part of Area 1, and 2.

Transcript, pp. 56-57.

Nowhere in this discussion, or in Dr. Lane's entire testimony, was the area designated as Area 4 on the map mentioned. Nor were Skagit Bay and Sara-

toga Passage ever mentioned in Dr. Lane's testimony regarding the Suquamish travels and fishing, or in her Report. While she did testify that the Suquamish traveled up to the Fraser River, her reference to the Strait of Juan de Fuca, Haro and Rosario Strait places their route on the west side of Whidbey Island, from the Port Madison area and up through the San Juan Islands. Her one statement in her report that the Suquamish traveled "to" Whidbey Island is insufficient to support a finding that they fished or traveled in the waters on the eastern side of Whidbey Island.

This absence of evidence regarding Squamish fishing or travel through Saratoga Passage and Skagit Bay leads the Court to conclude that the Upper Skagit and Swinomish have met their burden of demonstrating that Judge Boldt did not intend to include these areas in the Suquamish U & A. The Suquamish must now point to some evidence in the record that demonstrates that this conclusion is incorrect.

In support of their assertion that their U & A includes waters on the east side of Whidbey Island, the Suquamish point to Dr. Lane's finding that the treaty-time Suquamish were competent mariners who traveled widely. They assert that those travels would necessarily have included waters east of Whidbey Island. However, as noted above, Dr. Lane testified that it was "normal" for "all the Indians in Western Washington to travel extensively. . ." Transcript, p. 48. Thus such travel was not unique to the Suquamish, and no conclusion with respect to the subproceeding area can be drawn from the mere statement that they traveled widely. Dr. Lane's actual testimony, as shown above, addressed only

travel from the Suquamish territory up across the Strait of Juan de Fuca and through Haro and Rosario Straits, and the San Juan Islands. It would be pure speculation to conclude that those travels must also have included the east side of Whidbey Island, as there is absolutely no evidence in the record that they did so.

Next, the Suquamish point to the fact that they were found to fish at the mouth of the Snohomish River, which is on the eastern side of Whidbey Island, but well south of the area at issue. They assert that this fishing on the east side of Whidbey Island means that they could have well headed north into Saratoga Passage in their travels. However, Suquamish fishing in this area was described by Dr. Lane as fall and winter fishing at the mouth of a river, presumably to take the abundant migrating salmon. This fall and winter fishery was described by Dr. Lane as separate and distinct from the spring and summer travels up to the Fraser River. Thus, this reference to fishing at the mouth of the Snohomish River in the fall and winter cannot be deemed evidence that the Suquamish also traveled through that area on their way north to the Fraser River in the spring and summer. There was no mention in Dr. Lane's Report of Suquamish fishing anywhere north of the Snohomish River in their fall and winter fishery.

Finally, the Suquamish point to the close relations between their people and the Skagit and Snohomish people, who had fishing camps on Whidbey and Camano Islands. They ask that the Court assume that the close relations between the tribes meant that the Suquamish must necessarily have camped and fished there as well. However, any

connection between the Snohomish and Skagit camps on Whidbey and Camano Islands, and the Suquamish fishing in these areas, would again be purely speculative. There is nothing in Dr. Lane's report that places Suquamish camps in these areas, or documents Suquamish fishing there.

Judge Boldt found Dr. Lane's testimony to be authoritative and reliable in the original *U.S. v. Washington*, 384 F. Supp. at 350. His description of the Suquamish U & A tracks nearly verbatim the language in Dr. Lane's report, that the Suquamish had the "capability to travel widely over the marine waters in what are now known as the Strait of Juan de Fuca and Haro and Rosario Straits." Report, p. 16. Further, she reported, they "regularly travelled [sic] through the San Juan Islands and to the Fraser River." *Id.* In naming these specific areas in describing the Suquamish U & A, Judge Boldt demonstrated his intent to conform the Suquamish U&A to those areas documented by Dr. Lane. As noted by the Ninth Circuit Court of Appeals, where Judge Boldt has cited the specific, rather than the general, evidence presented by Dr. Lane, that evidence determines the boundaries of a tribe's U.&A. *U.S. v. Lummi Indian Tribe*, 235 F. 3d at 451.

For these reasons, the Court concludes that Judge Boldt did not intend to include Saratoga Passage or Skagit Bay within the U & A of the Suquamish. Indeed, it appears from the record that this is how the Suquamish themselves interpreted their U & A. The Suquamish understanding, in 1975, that their U & A excluded waters on the eastern side of Whidbey Island is indicated in the fishing regulations they issued following the Court's ruling on their U & A. These regulations appear in the record in the

Declaration of David Hawkins, Dkt. # 144, Exhibit C. These regulations set guidelines for fishing in specified marine and freshwater fishing areas. No fishing was proposed in marine area 5, on the eastern side of Whidbey Island, which at that time included the areas at issue in this subproceeding. *Id.* While the Suquamish correctly argue that it would be improper to use these fishing regulations as evidence of Judge Boldt's intent, it is not improper to use them as evidence of the Suquamish Tribe's understanding of their own U & A at that time.

CONCLUSION

The Court has reviewed the evidence that was before Judge Boldt in the April 1975 proceeding that led to the determination of the Suquamish U & A. That evidence, including maps, fisheries reports, anthropological reports, and testimony, demonstrates that the Court and the parties had a common understanding that the term "Puget Sound" generally described a continuous body of saltwater in western Washington, including all the bays and inlets, and specifically including Skagit Bay and Saratoga Passage. On some occasions, areas such as the Strait of Juan de Fuca and Hood Canal were described separately. On other occasions, Puget Sound was treated as divided into regions, namely Southern, Central, and Northern Puget Sound. Regardless of these differences, the term "Puget Sound" as used generally by Judge Boldt included Saratoga Passage and Skagit Bay.

However, in describing the individual tribes' usual and accustomed fishing areas, Judge Boldt was necessarily indicating only a portion of that broader Puget Sound, even when, as here, he used the term "Puget Sound" without qualification. Thus, for ex-

ample, in the description of the U & A of the Muckleshoot Tribe, the Court has found that the term "saltwater of Puget Sound" refers only to that portion of Puget Sound in Elliot Bay. *See, Muckleshoot III*, 235 F. 3d at 438. Similarly, it has been judicially determined that the Lummi U&A, described in part as "the marine areas of Northern Puget Sound from the Fraser River south to the present environs of Seattle" does not include the Strait of Juan de Fuca or Hood Canal. *U.S. v. Lummi*, 235 F. 3d at 451-52.

Here, the Court finds that in describing the Suquamish U & A as the marine waters of Puget Sound from Vashon Island up to the Fraser River, Judge Boldt could not have intended to include Saratoga Passage or Skagit Bay. Judge Boldt relied heavily on the report and testimony of Dr. Barbara Lane, and indeed in describing the Suquamish U&A he used terms and place names taken directly from her report on the Suquamish fishing and travels. Dr. Lane reported and testified that the Suquamish traveled by canoe from their territory (Port Madison) up through the San Juan Islands, and Haro and Rosario Straits, as far as the Fraser River. Nothing in her testimony or her report indicated a Suquamish presence in Saratoga Passage or Skagit Bay, neither as winter fishing grounds, nor as a route for travel up to the San Juan Islands.

The Court thus finds that there are no factual issues in dispute, and that the requesting parties are entitled to judgment as a matter of law on their claim that the Suquamish U & A does not include Saratoga Passage or Skagit Bay. Accordingly, the motions for summary judgment by the Upper Skagit and Swinomish are GRANTED, and the Suquamish motion for summary judgment is DENIED. As no

issues remain to be determined, the trial date of February 26 is now STRICKEN.

The Clerk shall enter judgment in favor of the Upper Skagit and Swinomish, and close the file. Dated this 3rd day of January, 2007.

//Ricardo S. Martinez
RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UPPER SKAGIT INDIAN TRIBE,
Plaintiff - Appellee,

and

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF WASHINGTON,
Defendant,

and

SUQUAMISH INDIAN TRIBE,
Defendant - Appellant,

v.

JAMESTOWN S'KLALLAM TRIBE;
LOWER ELWHA KLALLAM TRIBE;
LUMMI INDIAN NATION;
NISQUALLY INDIAN TRIBE; PORT
GAMBLE S'KLALLAM TRIBE;
SKOKOMISH INDIAN TRIBE;
TULALIP TRIBE,

No. 07-35061

D.C. Nos. CV-70-09213-RSM
SP-05-00003-RSM
WESTERN DISTRICT OF WASHINGTON, SEATTLE

ORDER

Plaintiff-intervenors -
Appellees,

SWINOMISH INDIAN TRIBAL
COMMUNITY,
Cross-claimant - Appellee.

Before: O'SCANNLAIN, RYMER and KLEINFELD, Circuit Judges.

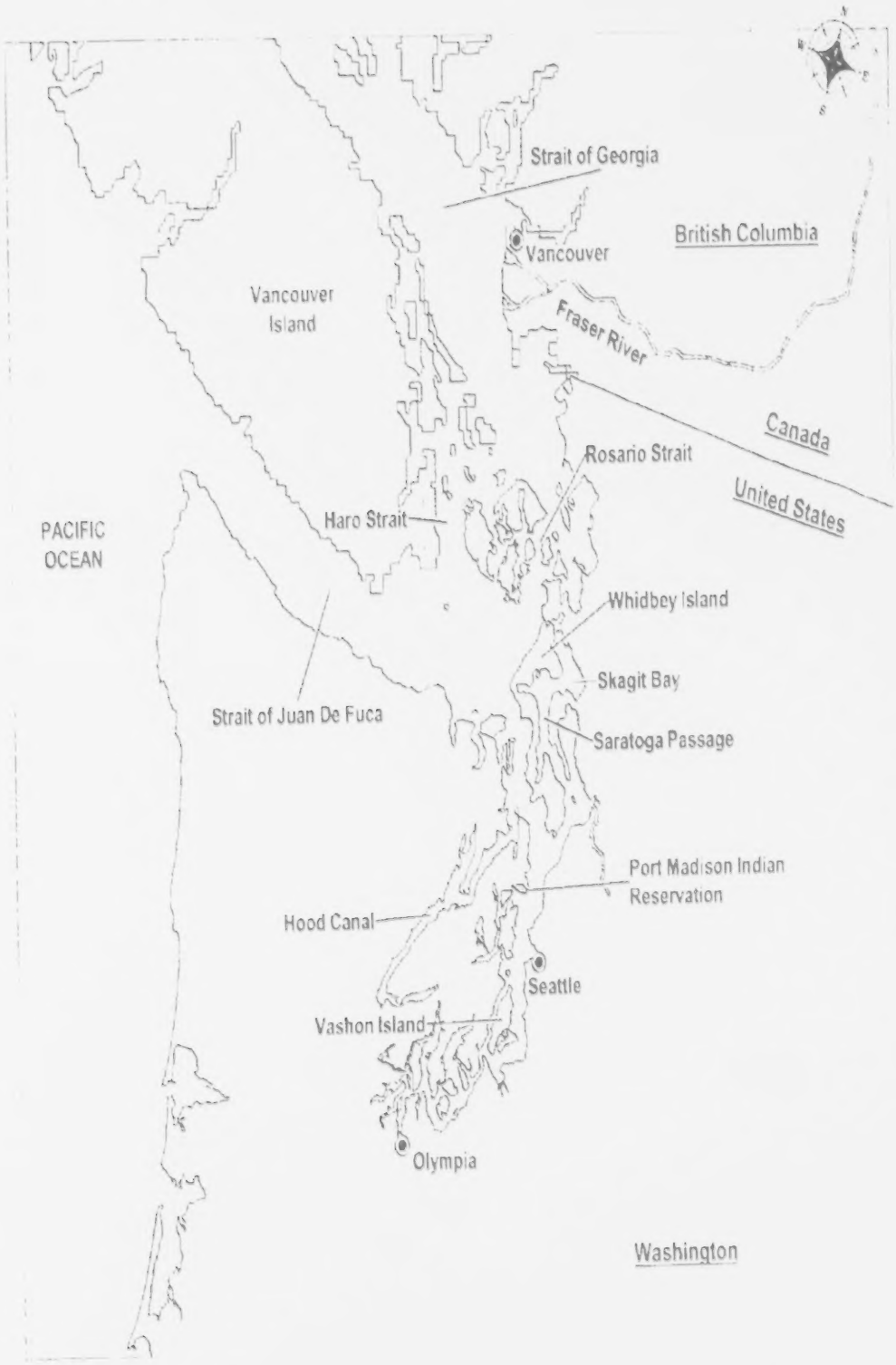
A majority of the panel has voted to deny the petition for rehearing en banc. Judge Kleinfeld voted to grant the petition for rehearing en banc.

The petition for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing en banc is DENIED.

APPENDIX E

Map of the Puget Sound region.


Strait of Georgia
British Columbia
Vancouver
Vancouver Island
Fraser River
Canada
Rosario Strait
United States
Haro Strait
PACIFIC OCEAN
Whidbey Island
Skagit Bay
Strait of Juan De Fuca
Saratoga Passage
Port Madison Indian Reservation
Hood Canal
Seattle
Vashon Island
Olympia
Washington

(2)

No. 10-33

Supreme Court, U.S.
FILED
SEP 17 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SUQUAMISH INDIAN TRIBE,

Petitioner,

v.

UPPER SKAGIT INDIAN TRIBE, SWINOMISH INDIAN TRIBAL COMMUNITY, JAMESTOWN S'KLALLAM TRIBE, LOWER ELWHA KLALLAM TRIBE, LUMMI INDIAN NATION, NISQUALLY INDIAN TRIBE, PORT GAMBLE S'KLALLAM TRIBE, SKOKOMISH INDIAN TRIBE, AND TULALIP TRIBES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BY RESPONDENT TRIBES UPPER SKAGIT INDIAN TRIBE, SWINOMISH INDIAN TRIBAL COMMUNITY, JAMESTOWN S'KLALLAM TRIBE, PORT GAMBLE S'KLALLAM TRIBE, AND TULALIP TRIBES

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QUESTION PRESENTED

In 1975 the district court in *United States v. Washington,* W.D. Wash. No. C70-9213, a case involving the treaty fishing rights of 21 Indian tribes in northwest Washington, made a factual determination of the Suquamish Tribe's usual and accustomed fishing places (U&As). A tribe's U&As comprise the area within which a tribe has a treaty right to fish and are based upon the tribe's historical fishing pattern at treaty time. Twenty-nine years after the finding was made, Suquamish changed its fishing pattern and for the first time in all the intervening years began fishing in Skagit Bay and Saratoga Passage. The tribes with established U&As in those waters challenged Suquamish's right to fish there and prevailed in the lower courts. The case presents one issue, which does not warrant this Court's review:

When confronted with interpreting the geographic extent of a prior U&A finding in *U.S. v. Washington,* may the court examine the evidence and record of proceedings before the judge who made the finding, including a bench ruling on the precise issue, to aid it in resolving whether a specific geographic area is within the tribe's U&As, where the language of the finding is unclear and ambiguous as to the specific area involved, and where the record before the court reveals a latent ambiguity in the language?

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STATEMENT OF THE CASE

This case involves a claim by Petitioner Suquamish Tribe to pursue treaty fishing in waters outside those originally described in the factual determination of its usual and accustomed fishing places (U&As), made in 1975 by District Court Judge George[1] Boldt in *United States v. Washington*. Such matters involve special consideration of anthropological and ethnohistorical evidence of the location and use of fishing areas in the mid-19th century by each of the 21 tribes involved in the case. For almost 30 years after its U&A finding, Suquamish fished on the western side of Puget Sound in accordance with that finding and never ventured into Skagit Bay or Saratoga Passage. Then suddenly, in 2004, Suquamish expanded its fishery into Saratoga Passage, precipitating this case. The issue presented is whether Skagit Bay and Saratoga Passage are included within Suquamish's previously determined U&As. Suquamish now contends that the term 'Puget Sound' invariably and unambiguously includes Skagit Bay and Saratoga Passage, and that this alone should have been determinative and ended the inquiry concerning its claim to expanded U&As. Pet. 1-2.

The Petition uses this case to attack a straw man, the prior Ninth Circuit decision in *United States v. Muckleshoot Indian Tribe*, 235 F.3d 429 (9th Cir. 2000) (*Muckleshoot III*). Pet. 5, 18, 20. That case

---

[1] Not Hugo, as the Petition has it. Pet. 1.

involved Muckleshoot marine U&As, which were broadly described as "the saltwater of Puget Sound," *Id.* at 431. In contrast, the U&A description at issue in this case is:

> the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.

United States v. Washington, 459 F. Supp. 1020, 1049, FF 5 (W.D. Wash. 1978) (*Decision II*). The two cases are quite different, so the attack on *Muckleshoot III* is misleading. This case does not turn on the meaning of 'Puget Sound.'

In this case the Ninth Circuit analyzed *all* of the language of the U&A finding, as well as its context. It determined that the language of the U&A finding did not clearly and unambiguously include Skagit Bay and Saratoga Passage, and proceeded to clarify the language and resolve the ambiguity by reviewing the proceedings and factual record before Judge Boldt at the time of his decision. The panel majority concluded that Judge Boldt did not intend to include the contested waters, because there was no evidence before him to support their inclusion and because the evidence affirmatively showed intent to exclude them.

That is exactly how a court should proceed in the presence of unclear or ambiguous language. There is nothing here that contravenes *Travelers Indemnity*

Co. v. Bailey, 129 S. Ct. 2195 (2009), the case upon which Petitioner relies. But even if the language of the Suquamish U&A finding unambiguously included the contested waters, the court below would nevertheless have been obliged to review the record before Judge Boldt to determine whether there is a latent ambiguity arising from a factual record that contravenes the allegedly unambiguous language. The end result in either case is thus the same.

The decision below is consistent with the law of this Court. It does not conflict with the law of other circuits or open a Pandora's box of problems for cases in other contexts. This case involves interpretation of a particular type of geographic finding and determination based upon anthropological and historical evidence of tribal fishing in 1855 that is uniquely tethered to and grounded upon that particular factual record. The decision below is limited to the special context of *United States v. Washington*, W.D. Wash. No. C70-9213, and has no reach beyond. It does not undermine the plain meaning rule in a broad spectrum of other legal contexts, either in the Ninth Circuit, or in other circuits.

Finally, Petitioner's basic premise is flawed. 'Puget Sound' does not have a fixed meaning that invariably includes Skagit Bay and Saratoga Passage. Both the common and the geographical meanings of the term exclude the waters in question. Judge Boldt did not use the term consistently in the very decision that Petitioner claims adopted a fixed

meaning of the term. Petitioner's argument thus fails on all levels.

A. Background on *United States v. Washington.*

The Respondent Tribes agree in the main with Petitioner's description of the tribes' treaty fishing rights and the general course of *United States v. Washington,* Pet. Statement Sections A and B, Pet. 3-7, with one notable exception. Judge Boldt did not detail "with great precision" the areal extent of the tribal U&As, as Petitioner asserts. Pet. 6. Many of these findings, including the one at issue in this case, are anything but precise. *See* Argument III.B. *infra.*

We add one point to Petitioner's discussion of U&As. Tribal travel through an area does not establish U&As in the area traversed. Travel must be accompanied by fishing that must be more than "occasional and incidental." *Decision I,* 384 F. Supp. at 353, 356. U&As include only those marine waters "transited or resorted to by a tribe on a regular and frequent basis in which fishing was one of the purposes of such use." *United States v. Washington,* 626 F. Supp. 1405, 1531 (W.D. Wash. 1985) (*Decision III).* Suquamish had the burden to show this for each area in which it claimed U&As.

B. This Proceeding.

This case involves the specific waters known as Skagit Bay and Saratoga Passage. The location of

these waters is shown on the map appended to the Petition, Pet. 57a, as well as the map appended to this brief at 1a.[2] Geographically, "these waters are nearly enclosed or inland waters to the east of Whidbey Island." Pet. 7a, n. 6.

This case was precipitated in 2004 when the Suquamish Tribe, for the first time in the 29 years since its treaty fishing rights were recognized and the U&A finding was made, entered Saratoga Passage to fish. Pet. 18a. In response, the Upper Skagit Indian Tribe commenced, and the Swinomish Indian Tribal Community joined, a sub-proceeding in *United States v. Washington* challenging Suquamish's right to fish in Skagit Bay and Saratoga Passage by claiming that Suquamish had no U&As there. Pet. 3a. The Tulalip Tribes, who also have U&As in Saratoga Passage, joined in the proceedings as well, as did the Jamestown and Port Gamble S'Klallams.

The district court ruled that Suquamish U&As did not include the contested waters. Pet. 31a-54a. It found that the term 'Puget Sound', as used by Judge Boldt, included Skagit Bay and Saratoga Passage. *Id.* 44a. However, based upon an examination of the proceedings and factual record before Judge Boldt when he made the U&A finding, the district court concluded that Judge Boldt did not intend to include Skagit Bay and Saratoga Passage in

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[2] This map is included in the Excerpts of Record filed in the Ninth Circuit, ER 0374.

Suquamish U&As. As a result the district court held that Suquamish had no right to fish in those waters. *Id.* 51a.

The Ninth Circuit panel originally reversed the district court. However, upon petition by the Respondent Tribes, the panel granted rehearing, withdrew its prior opinion, and substituted a new opinion in which a majority of the panel affirmed the district court. Pet. 3a.

The Ninth Circuit decision below did not follow the district court and adopt a meaning of 'Puget Sound,' as the Petition implies, Pet. 1-2. Rather, the Ninth Circuit rejected that definition in construing the U&A language as a whole. Pet. 11a. The panel majority began its analysis by focusing on whether the U&A finding "is ambiguous or that the court intended something other than its apparent meaning." *Id.* 8a-9a. The panel analyzed the language of the U&A finding as a whole (something the district court had failed to do) as well as the record before Judge Boldt upon which the U&A finding was based. *Id.* 9a-11a.

In addressing the language of the U&A finding, the panel did not fix its inquiry on 'Puget Sound,' but instead focused on the "specific geographic anchor points" in the Suquamish U&A language that described the limits of the U&A area. *Id.* 10a. The panel observed that Judge Boldt regularly used such descriptors in describing U&As, and that in this case the relevant "inclusive geographic anchor points,"

Haro and Rosario Straits, "do not include or delineate" Skagit Bay or Saratoga Passage. *Id.* 10a-11a. The panel also contrasted the Suquamish U&A finding with the Swinomish U&A finding made in the very next paragraph of the same order:

> The Swinomish U&A used the phrase 'marine waters of northern Puget Sound,' but it also used geographic anchors delineating an area that specifically included Saratoga Passage and Skagit Bay. As the district court (and the Suquamish) recognized, *the inquiry properly focuses on individual U&As,* and the fact that Judge Boldt defined 'Puget Sound' in one instance as including Skagit Bay and Saratoga Passage does not mean that the references to 'Puget Sound' in other U&As always include the same areas. *If anything, the judge's inclusion of reference points in one U&A but not in another indicates a lack of intent to include them generically.*

Pet. 11a (emphasis added).

The Ninth Circuit also examined the proceedings and factual record before Judge Boldt. *Id.* 9a-10a. The factual record for the Suquamish U&A finding consisted solely of the expert report and testimony of Suquamish's expert, anthropologist Dr. Barbara Lane. Pet. 45a-49a. That record is utterly devoid of evidence that Suquamish traveled through Skagit Bay and Saratoga Passage, let alone fished there. Pet. 10a n. 9, 49a. And importantly, the record indicates an affirmative intent to exclude those waters.

At the hearing on Suquamish U&As, the State challenged Dr. Lane's conclusions concerning U&As based upon the travel route from the Suquamish home territory to the Fraser River. That home territory is on the west side of Puget Sound[3] across the Sound west of Seattle, south and west of the contested waters. Pressed by the State to specify the waters traversed, Lane described the travel route northward through Haro and Rosario Straits and identified the route with the aid of a map provided by the state as part of area 1 and area 2 on the map. This map is appended at 2a, *infra*.[4] Because Skagit Bay and Saratoga Passage are in area 4 on the map, they were not included in this description. Pet. 48a-49a.

This testimony of Dr. Lane was incorporated in Judge Boldt's ruling from the bench on Suquamish travel U&As the next day, which also made reference to the map:

> The Court finds that a prima facie showing has been made that travel and fishing of the Suquamish Tribe through the north Sound areas, *that is areas one and two as designated by the state,* was frequent and also regular, not merely occasional, and the

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[3] Used here without the single quote marks, because this area is within Puget Sound however broadly or narrowly defined.

[4] This map is included in the Excerpts of Record filed in the Ninth Circuit, ER 0453.

> application of the Suquamish for such a ruling is granted.

Pet. 9a (emphasis added by Ninth Circuit). Based on Dr. Lane's testimony and the court's ruling, the Ninth Circuit concluded that Judge Boldt did not intend to include Skagit Bay and Saratoga Passage in Suquamish U&A. Pet. 12a.

The Ninth Circuit panel majority affirmed the district court and voted to deny rehearing en banc. Judge Kleinfeld dissented from the decision and voted to grant the petition. The petition was circulated to the full Ninth Circuit and no judge requested an en banc vote. Pet. 56a.

ARGUMENT

I. The Language of the U&A Finding and Determination, Taken as a Whole, is Unclear and Ambiguous.

Petitioner's entire argument for granting certiorari is based upon two false premises: first, that this case can be decided on a fixed definition of 'Puget Sound' alone and second, that the broad definition of 'Puget Sound' is necessarily the one used in its U&A finding. But this case does not involve U&As described simply as 'Puget Sound,' in contrast to *Muckleshoot III*. 235 F.3d at 431. The U&A finding at issue states:

> The usual and accustomed fishing places of the Suquamish Tribe include the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River including Haro and Rosario Straits, the streams draining into the western side of this portion of Puget Sound and also Hood Canal.

Decision II, 459 F. Supp. at 1049, FF 5.

It is clear from this language that Suquamish U&As do not include all of 'Puget Sound,' however defined. It is the limiting, specific geographic anchors that are the key to determining the geographic extent of the U&A finding. The language must be examined as a whole, as well as in context. "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). *Accord, United States v. Santos*, 128 S. Ct. 2020, 2024 (2008) ("context gives meaning"). If, when taken as a whole and viewed in context, the language is unclear or ambiguous, then the court must look at the record to resolve the ambiguity and clarify the U&A finding, which is just what the Ninth Circuit did below.

We do not understand Petitioner to dispute this proposition. In fact, two of the cases that Petitioner cites, Pet. 20, 22, 27, expressly agree with or applied this approach: *United States v. Spallone*, 399 F.3d 415, 424 (2nd Cir. 2005) ("[W]here, as in this case, an ambiguity in terminology results in a lack of clarity as to the scope of the ruling, 'a reviewing court may

properly examine the entire record for purposes of determining what was decided.'"); [5] *Security Mut. Cas. Co. v. Century Cas. Co.*, 621 F.2d 1062, 1066 (10th Cir. 1980) ("If there is any ambiguity or obscurity or if the judgment fails to express the rulings in the case with clarity or accuracy, reference may be had to the findings and the entire record for the purpose of determining what was decided.").

The specific geographic descriptors in the U&A finding at issue here confuse and confound Petitioner's view of the meaning of 'Puget Sound.' For if 'Puget Sound' truly includes "the Strait of Juan de Fuca and all saltwater areas inland therefrom," as Petitioner contends, Pet. 9, then the U&A finding would read in its entirety: "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River." It should not have included 'Hood Canal,' or 'Haro and Rosario Straits', because in Petitioner's view these waters are included in 'Puget Sound.' Petitioner's argument would render the inclusion of these waters superfluous and irrelevant. This violates "one of the most basic interpretive canons": the language "should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 129 S. Ct. 1558, 1566

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[5] *Spallone* was also cited and quoted with approval in the case upon which Petitioner's argument relies, *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. at 2204.

(2009), *quoting Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

If the specific descriptors are not simply ignored, they undermine Petitioner's argument. The phrase "including Haro and Rosario Straits" implies the exclusion of other, unnamed waters, such as Skagit Bay and Saratoga Passage, and appears to set an eastern boundary of the U&As that excludes Skagit Bay and Saratoga Passage. This comports with the interpretive canon that "expressing one item of an associated group excludes another left unmentioned." *Chevron U.S.A. Inc. v. Echazabad*, 536 U.S. 73, 80 (2002). Petitioner's argument is further undermined by the phrase "and also Hood Canal." The use of "and also" forcefully demonstrates that the expansive definition of 'Puget Sound' is *not* being employed. In addition, Petitioner's definition would render superfluous the reference to "Hood Canal."

The panel majority recognized and followed these principles of interpretation. It did *not* adopt the district court's approach to the meaning of 'Puget Sound' upon which Petitioner relies. Instead, it engaged in an analysis of *all* of the language of the U&A finding and determination, as well as its context. The panel addressed the "inclusive geographic anchor points" in the U&A language, and noted that the inclusion of "Haro and Rosario Straits" implied the exclusion of Skagit Bay and Saratoga Passage. Pet. 10a-11a. It contrasted the absence of any language that specifically includes or delineates Skagit Bay and Saratoga Passage in the Suquamish U&A

finding with the specific inclusion of those waters in the very next paragraph of the decree in the Swinomish U&A finding.[6] *Id.* 11a. The panel majority thus identified ambiguities and obscurities in the language and context of the U&A finding that cut against inclusion of the contested waters. That is more than sufficient to support proceeding to an examination of the factual record upon which the U&A finding was based.

The panel majority performed that examination. It concluded, as had the district court, that Judge Boldt intended to exclude Skagit Bay and Saratoga Passage from the Suquamish U&A finding. Pet. 12a. This approach is perfectly consistent with *Travelers Indemnity* and other applicable case law, as described below.

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[6] The Swinomish marine U&As are described as "the marine areas of northern Puget Sound from the Fraser River south to and including Whidbey, Camano, Fidalgo, Guemes, Samish, Cypress, and the San Juan Islands, and including Bellingham Bay and Hale Passage adjacent to Lummi Island." *Decision II*, 459 F. Supp. at 1049, FF 6. Saratoga Passage is between Whidbey and Camano Islands, and Skagit Bay is to the north, between Whidbey Island and the mainland. *See* 1a, *infra*.

II. The Decision Below Does Not Conflict with *Travelers Indemnity.*

A. This Case is Consistent with *Travelers Indemnity.*

Petitioner's argument is based upon a conflict between the decision below and this Court's decision in *Travelers Indemnity Co. v. Bailey*, 129 S. Ct. 2195 (2009). In pressing this argument, Petitioner seeks to transmogrify this case into *Muckleshoot III* and attacks that case instead of the decision below. But, as we have seen above, this case is not *Muckleshoot III*, because the geographic description of the U&As here contains additional geographic anchors that describe the areal extent of the U&As and is not limited to 'Puget Sound.'

In this case the Ninth Circuit did not follow a path at odds with *Travelers Indemnity.* Nothing in *Travelers* requires a case to be resolved based on the meaning of a key word or phrase in isolation, and without regard to other language or the context. In fact, this Court found that the key operative term in the prior bankruptcy court order being construed in *Travelers*, "based upon, arising out of or relating to," was ambiguous and could not be literally applied. *Id.* at 2203-2204. This Court repeated Justice Scalia's observation that literal application of a similar phrase "was a project doomed to failure." *Id.* at 2203, *quoting California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). The Court not only examined the other language of the order at issue,

but also the "detailed findings of the Bankruptcy Court" on the nature of the claims at issue, and concluded that the claims were "within the terms of the [prior order] without pushing its limits." *Id.* at 2204.

This Court went on to reject an argument based on the parties' understanding of the prior order,[7] invoking the plain meaning rule. *Id.* But that was only after the Court had examined the language of the order as a whole as well as its context, a process similar to that followed by the court below. The only difference is this Court found no ambiguity in *Travelers,* whereas the Ninth Circuit found the U&A finding to be ambiguous in this case.

B. Even if the Language of the U&A Finding Were Found to be Unambiguous, the Decision Below Would Not Conflict with *Travelers Indemnity*.

Even if the ambiguity inquiry were confined to the term 'Puget Sound,' and even if the court found no patent ambiguity and gave the term the meaning Petitioner advances, the decision below would still not conflict with *Travelers Indemnity* or other plain meaning cases. This case involves a prior factual determination of a court, and an examination of the record before the court upon which the factual

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[7] This is a quite different inquiry than the inquiry into a *judge's* intent that is involved in this case. *See* Sec. B, *infra*.

determination was based may – and in this case does – reveal a latent, or extrinsic, ambiguity which can be resolved only by an examination of the record.

Travelers Indemnity involved a bankruptcy court order adopting a settlement agreement and reorganization plan – a type of consent decree. The plain meaning rule with regard to consent decrees does not begin with *Travelers*, but has a long pedigree in this Court. The rationale for the 'four corners' or plain meaning rule as applied to consent decrees was laid out in detail in *United States v. Armour & Co.*, 402 U.S. 673, 681-682 (1971), which expressly distinguished consent decrees from orders resulting from litigation:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case . . . Naturally, the agreement embodies a compromise . . . [T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners. . . .

Accord, Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 378 (1992).

The rationale for this rule applies to *Travelers Indemnity*, but not to this case. Here, the decree being construed is a factual "finding[] and determination[]." *Decision II,* 459 F. Supp. at 1049, FF 8. The U&A finding is based upon, determined by and tethered to the factual record before the court that made the finding. The finding is not a linguistic artifact standing apart from, but instead a product and signifier of, the factual record. This is not true of consent decrees, legislation, contracts, or the performative or injunctive portions of decrees, which do not reflect an external record in the same way, if at all.

Further, in the specific context of U&A findings in *United States v. Washington,* it is appropriate to examine the proceedings and factual record before the court at the time the finding was made, even if the U&A language does not show a patent ambiguity, because the record below may reveal a latent, or extrinsic, ambiguity. A latent, or extrinsic, ambiguity "does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." *Black's Law Dictionary* (7th ed. 1999) at 80.

If the facts of record clearly do not support or are at odds with the language of the U&A finding, a latent ambiguity is revealed. The court cannot be thought to have intended a factual finding unsupported by or at odds with the record before it. The record before the court must then be examined to assist in resolving the latent ambiguity. "It is settled

doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence." *Patch v. White,* 117 U.S. 210, 217 (1886). Here, the latent ambiguity emerges when the focus is on the question of whether a specific geographic area, Skagit Bay and Saratoga Passage, is within the areal extent of the U&A finding.

Long ago this Court applied the concept of latent ambiguity to descriptions of geographic area. *See, e.g., Reed v. Proprietors of Locks & Canals on Merrimac River,* 49 U.S. (8 How.) 274, 289 (1850). The doctrine has been invoked or applied more recently in other contexts as well. *See, e.g., Markham v. Westview Instruments, Inc.,* 517 U.S. 370, 385-386 (1996) (latent ambiguity in patent context); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (latent ambiguity in "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters"); *United States v. Morton,* 467 U.S. 822, 836 n. 21 (1984) ("Litigation often brings to light latent ambiguities or unanswered questions that might not otherwise be apparent"); *Chemeheuvi Tribe of Indians v. Federal Power Comm'n,* 420 U.S. 395, 404 (1975) (involving "ambiguity latent in the seemingly clear language chosen by Congress").

C. The Decision Below is Narrow and Case Specific.

Viewed in this light, the decision below and Petitioner's straw nemesis, *Muckleshoot III,* embody an approach specifically adapted and tailored to a particular type of sub-proceeding (interpretation of U&A findings) in the particular case in which it arose, *United States v. Washington.* In that specific context, and given the court's experience with imprecise U&A language, it is appropriate to review the record before the court upon which the U&A finding was based to resolve the meaning of unclear and ambiguous language and to see whether there is a latent ambiguity. That is all *Muckleshoot III* stands for.

Petitioner asserts that the U&A findings were "detailed with great precision," Pet. 6, but as the district court and the Ninth Circuit have discovered, the U&A findings often involve vague geographic descriptors, not metes and bounds descriptions.[8] The initial U&A findings in *United States v. Washington*, 384 F. Supp. 312, 359-382 (W.D. Wash. 1974) (*Decision I*), and *Decision II,* 459 F. Supp. at 1048-1050, 1058, were described "in general," not with precision. *Decision I,* 384 F. Supp. at 402. The Ninth Circuit agreed when it found itself faced with the task of

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[8] Of the 21 initial U&A findings for tribes in *United States v. Washington,* only the last two of these findings, made years after the Suquamish U&A finding by a different district court judge, were shown with boundaries on a map incorporated in the finding. *Decision III,* 626 F. Supp. 1405, 1442-1443, 1486.

determining what Judge Boldt meant "in precise geographical terms" which were lacking in the findings themselves. *Muckleshoot Tribe v. Lummi Indian Tribe,* 141 F.3d 1355, 1359 (9th Cir. 1998) *(Muckleshoot I). Muckleshoot III* also recognized this problem and responded to it with a guideline for approaching the issue of latent ambiguity in that particular context.

Thus even if the Ninth Circuit panel below had not found a patent ambiguity, it would nevertheless have been proper for the panel to examine the record before the court at the time the U&A finding was made to determine whether the judge intended something other than the language seemed to indicate.

There are undoubtedly many cases in which the record below would not be clear enough either to resolve a patent ambiguity or reveal a latent one. But this is not one of them. There is simply no evidence in the record that Suquamish even traveled through Skagit Bay and Saratoga Passage, let alone did so frequently and also fished there frequently. Pet. 10a n. 9, 49a. Without that evidence, there is no basis for a U&A finding including those waters.

Further, there is clear, uncontroverted evidence that these waters were specifically excluded. All of the evidence on Suquamish U&As came from a single expert anthropologist relied upon by Suquamish to establish its U&As. That witness described the relevant geographic extent of the U&As clearly with the aid of a map, 2a, *infra*, and that description excludes Skagit Bay and Saratoga Passage. Pet. 48a-49a.

The next day Judge Boldt ruled on Suquamish U&As from the bench with reference to the same map and again excluded the contested waters. Pet. 9a. That ruling, which described the travel as "frequent and regular," *id.*, delimited the U&A area arising from travel with specific reference to the standard applicable to travel U&As. *See* Statement, Sec. A, *supra*.

III. The Decision Below Does Not Create Conflicts with Other Circuits or Undermine the Plain Meaning Rule.

A. There is No Conflict Among the Circuits.

Petitioner cites cases from other circuits that it claims conflict with the decision below. But there is no conflict among the circuits here. The decision below is consistent with the general rule on plain meaning and involves a narrow, specific context of a particular type of fact-finding based upon tribal fishing over 150 years ago in a specific treaty rights case, with no implications for wider application.

First, Ninth Circuit law is in complete agreement with *Travelers Indemnity* and the general rule regarding unambiguous language. "A consent decree, like a contract, must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the decree." *United States v. Asarco Inc.*, 430 F.3d 972, 980 (9th Cir. 2005). *Accord, United States v. FMC Corp.*, 531 F.3d 813, 819 (9th Cir. 2008); *Nehmer v. U.S. Dept. of Veterans Affairs*,

494 F.3d 846, 861 (9th Cir. 2007); *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996). Neither *Muckleshoot III* nor this case changed circuit law in that regard.

Second, the decision below does not conflict with *any* of the ten cases from other circuits cited in the Petition. Pet. 20-23. Not a single one of those cases involves interpretation of a court's prior factual determination. Seven of those cases found no ambiguity in the language of an order, but all seven involved contexts other than fact-finding.[9]

In the remaining three cases cited by Petitioner, the courts did just what the Ninth Circuit did in this case: found the language of the order ambiguous and resolved the ambiguity by examination of the record. *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 286-288 (3rd Cir. 1991) (interprets ambiguous order in light of evidence of court's intent); *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1439 (3rd Cir. 1991) ("It is our responsibility to construe a judgment so as

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[9] These cases are *Negron-Almeda v. Santiago*, 528 F.3d 15 (1st Cir. 2008) (order dismissing claims); *Alstom Caribe, Inc. v. George P. Reintjes Co., Inc.*, 484 F.3d 106 (1st Cir. 2007) (order dismissing case); *In re Thinking Machines Corp.*, 67 F.3d 1021 (1st Cir. 1995) (statute); *Sec. & Exch. Comm'n v. Hermil, Inc.*, 838 F.2d 1151 (11th Cir. 1988) (order in securities case); *Dunlop v. Ledet's Foodliner of Larose, Inc.*, 509 F.2d 1387 (5th Cir. 1975) (contempt judgment); *In re National Gypsum Co.*, 219 F.3d 478 (5th Cir. 2000) (bankruptcy Ch. 11 agreed reorganization plan – a consent decree); *Spearman v. J & S Farms, Inc.*, 755 F. Supp. 137 (D. S.C. 1990) (declaratory judgment).

to give effect to the intention of the court."); *United States v. Spallone,* 399 F.3d at 424 (where language is ambiguous or unclear "the entire record must be examined for the purpose of determining what was decided.").

Petitioner also relies upon cases involving consent decrees. Pet. 24. These are irrelevant to this case because they do not involve factual determinations of a court. *See* Argument II.A., *supra.* In addition, one of the cases cited, *Ahern v. Bd. of Educ. of City of Chicago,* 133 F.3d 975, 981 (7th Cir. 1998), acknowledges that "even 'when the terms of the instrument are clear,' extrinsic evidence may be used in the rare situation where a latent ambiguity exists."

Third, Petitioner marshals eleven cases that illustrate types of cases the decision in this case purportedly might affect. Pet. 26-27. Again, not a single one of these cases involves the interpretation of a factual determination, so none is like the present case. In addition, *most* of the cases are consistent with the Ninth Circuit decision here because they involved an examination of the record beyond the language of the order to resolve an ambiguity: *Ford Motor Co.,* 930 F.2d at 286-288 (interprets ambiguous language in light of evidence of court's intent); *United States v. Georgia,* 171 F.3d 1344, 1348-1350 (11th Cir. 1999) (interprets school desegregation order in light of language of the entire order, its context and history); *Ahern,* 133 F.3d at 981 (acknowledges latent ambiguity rule); *Capacchione v. Charlotte-Mecklenburg Schools,* 57 F. Supp. 2d 228,

246 (W.D. N.C. 1999) (creates a single standard for racial balancing from a "mishmash of standards gleaned from several [prior] orders" in the case); *Security Mut. Cas. Co.*, 621 F.2d at 1066 (examines entire record to resolve ambiguity); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 626 F.2d 95, 98 (9th Cir. 1980) (applies lower court's findings of "relevant surrounding circumstances" at the time of the decree to construe ambiguous language).

Thus of all the cases cited, not a single one involves interpretation of a finding of fact, and many of them involved resolution of the meaning of ambiguous language by examination of the record, just as the Ninth Circuit did below. The lack of citation to contrary cases in the Petition that involve interpretation of a finding of fact only serves to underscore the narrow context of this case.

The Westlaw citation history of *Muckleshoot III* also reflects the narrow context involved here and establishes that Petitioner's concerns are pure hyperbole. This Court denied review of that case. *Muckleshoot Indian Tribe v. Puyallup Indian Tribe*, 534 U.S. 950 (2001) (Mem.). In the decade since *Muckleshoot III* was decided it has been cited only eight times. Half of these occasions are within *United States v. Washington*. Of the other four, *none* cite *Muckleshoot III* for a rule of interpretation of judicial orders, factual or otherwise. If the floodgates are to open, they would likely have opened by now.

B. The Decision Below Protects Finality and Repose.

Petitioner also claims that the decision below undermines finality and repose. Pet. 28-31. But in the context of *United States v. Washington,* a wooden application of Petitioner's broad fixed meaning of 'Puget Sound' regardless of context would have the opposite effect. This case arose when the Suquamish Tribe suddenly, 29 years after its U&A finding was entered, decided to fish waters that had been closed for fishing for all those years. Suquamish had claimed broader U&As prior to the U&A finding, but shortly after the U&A finding was entered Suquamish changed its fishing regulations to exclude fishing in Skagit Bay and Saratoga Passage. Pet. 11a, 51a-52a. Suquamish thus well understood that its U&As did not include these waters. And this is not Suquamish's first attempt to expand beyond its U&As. Earlier, when Suquamish attempted to expand its fishery to the east side of central Puget Sound, the Ninth Circuit rejected this expansion, ruling that Suquamish U&As were limited to "the west side of Puget Sound." *United States v. Suquamish Indian Tribe,* 901 F.2d 772, 774 (9th Cir. 1990).

Substitution of a single, expansive, and fixed meaning of 'Puget Sound' for a nuanced examination of the U&A finding as a whole, its context and, where appropriate, the record before the court will encourage other tribes to seek a similar expansion of their fisheries. This can only threaten to undermine the complex web of dozens of agreements, decrees,

management plans and understandings of the parties that provides the framework for regulation of the northwest Washington marine fishery for Indians and non-Indians alike in *United States v. Washington*, that most "comprehensive and complex" case. Pet. 4a.

IV. The Term 'Puget Sound' is Ambiguous.

Petitioner's reliance on a purported meaning of 'Puget Sound' is misplaced for an additional reason: the term 'Puget Sound' is ambiguous. The Ninth Circuit decision below did not address the issue, but the district court ruled that 'Puget Sound,' was not ambiguous.[10] Pet. 44a. The Respondent Tribes disputed that ruling on appeal below and do so again briefly to preserve the issue here.

We begin where the plain meaning analysis usually begins, with the common meaning of the term. This Court has often resorted to dictionaries to identify the common meaning. *See, e.g., Carcieri v. Salazar*, 129 S. Ct. 1058, 1064 (2009); *Astrue v. Ratliff*, 130 S. Ct. 2521, 2526 (2010). Here Petitioner's argument runs aground, for the most common dictionary definition of 'Puget Sound' does *not* include the waters of Skagit Bay and Saratoga Passage. Some dictionaries define 'Puget Sound' as "a deep inlet of

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[10] This ruling conflicts with *United States v. Lummi Indian Tribe*, 235 F.3d 443, 449 (9th Cir. 2000), a U&A case in which the Ninth Circuit rejected the same argument made by Petitioner in this case and held that the U&A finding was ambiguous.

the Pacific in W Wa extending S from the Strait of Juan de Fuca through Admiralty Inlet," *American Heritage College Dictionary* (4th ed. 2004) 1128, or some variant that describes the same waters. *See, e.g., Webster's New Collegiate Dictionary* (1976 ed.) 1478; *Merriam-Webster Online*, www.merriam-webster.com, search: "Puget Sound". A search on www.online.com, a website that retrieves a number of dictionary definitions of a term, reveals that of the six definitions describing the geographic extent of 'Puget Sound' more specifically than the generic 'northwest Washington,' five were variants of the definition cited above, and only one appears to include Skagit Bay and Saratoga Passage. *Id.*, search: 'Puget Sound.' The plain meaning of the term as reflected in dictionaries thus shows that, if anything, the term *excludes* the contested waters in this case.

'Puget Sound' may also be viewed as a geographic term that might vary from the ordinary meaning. But that is not the case. The record below contains the reports of three experts who addressed the meaning of the term 'Puget Sound,' and all three agreed, as stated by Petitioner's own expert, that Puget Sound is "commonly defined as including all marine waters southward from Admiralty Inlet *and the southern edge of Saratoga Passage.*"[11] (emphasis added).

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[11] This quotation can be found in the Excerpts of Record filed with the Ninth Circuit, ER 0384.

Finally, there is District Judge Boldt's use of the term in *Decision I,* the decision that Petitioner claims fixed an expansive meaning of 'Puget Sound'. That decision includes at least four examples where Judge Boldt used the term more narrowly than the expansive definition claimed by Petitioner (language showing variance is emphasized):

> [Makah] commercial boats go as far as fifty miles out to sea, *east to Puget Sound* and south To Westport and the Columbia River.
>
> *Decision I,* 384 F. Supp. at 364-365.[12]
>
> . . . sport and commercial fishing for salmon in the offshore areas within the three mile limit, *the Strait of Juan de Fuca* and Puget Sound . . .
>
> *Id.* at 390.
>
> . . . to provide an equal take to the Canadian and the American commercial fishermen in *the Strait of Juan de Fuca*, Northern Puget Sound, *and the Strait of Georgia* . . .
>
> *Id.* at 392-393.

---

[12] Makah is located on the ocean, at the western end of the Strait of Juan de Fuca. The quoted language thus describes travel east through the entire Strait of Juan de Fuca *to* 'Puget Sound'.

> . . . with jurisdiction to regulate the harvest of pink and sockeye salmon on the *Strait of Juan de Fuca and* northern Puget Sound . . .
>
> *Id.* at 411.

This alone is sufficient to establish that 'Puget Sound' is ambiguous as to areal extent, because once it is established that a term has different meanings in the same document "the term standing alone is necessarily ambiguous." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997).[13]

Petitioner's own analysis of 'Puget Sound' reaches outside the language of the U&A finding and the specific proceeding in which the finding was made and searches elsewhere in the record of *United States v. Washington* for clues to the meaning of the term. There are many problems with that effort, but a major stumbling block is this: If one must resort to a search outside the language itself and its immediate context to dredge through other proceedings in this complex case, one has stepped outside the 'four corners.' If one is to sift through the entire case record, why would one ignore the immediate, direct context and the best available source for meaning:

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[13] The Respondent Tribes also argued below that Petitioner is estopped to deny that 'Puget Sound' is ambiguous because it argued in a prior sub-proceeding of *United States v. Washington*, Subp. 97-1, that Judge Boldt used the term with "maddening inconsistency." ER 0322. Suquamish prevailed on that argument, giving rise to judicial estoppel here. *New Hampshire v. Maine*, 532 U.S. 742, 743 (2001).

the proceedings and factual record upon which the U&A finding was based? By what rule, by what logic, would a court prefer a definition of a term used in a different proceeding, for a different purpose, to a ruling by the judge from the bench directly on the question involved with reference to a map that unmistakably identifies that the U&A finding does *not* include the contested waters?

CONCLUSION

The petition for certiorari should be denied.

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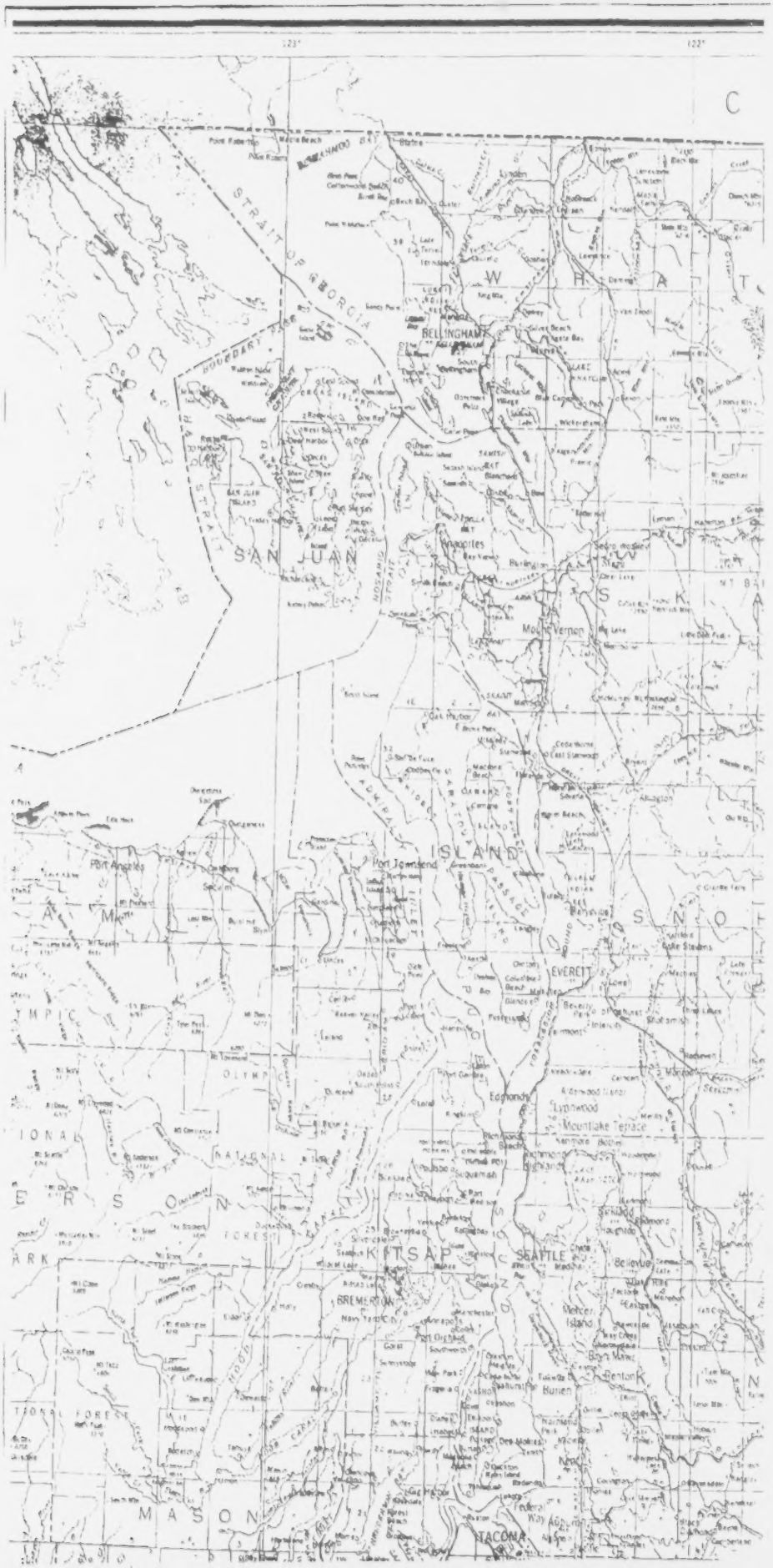
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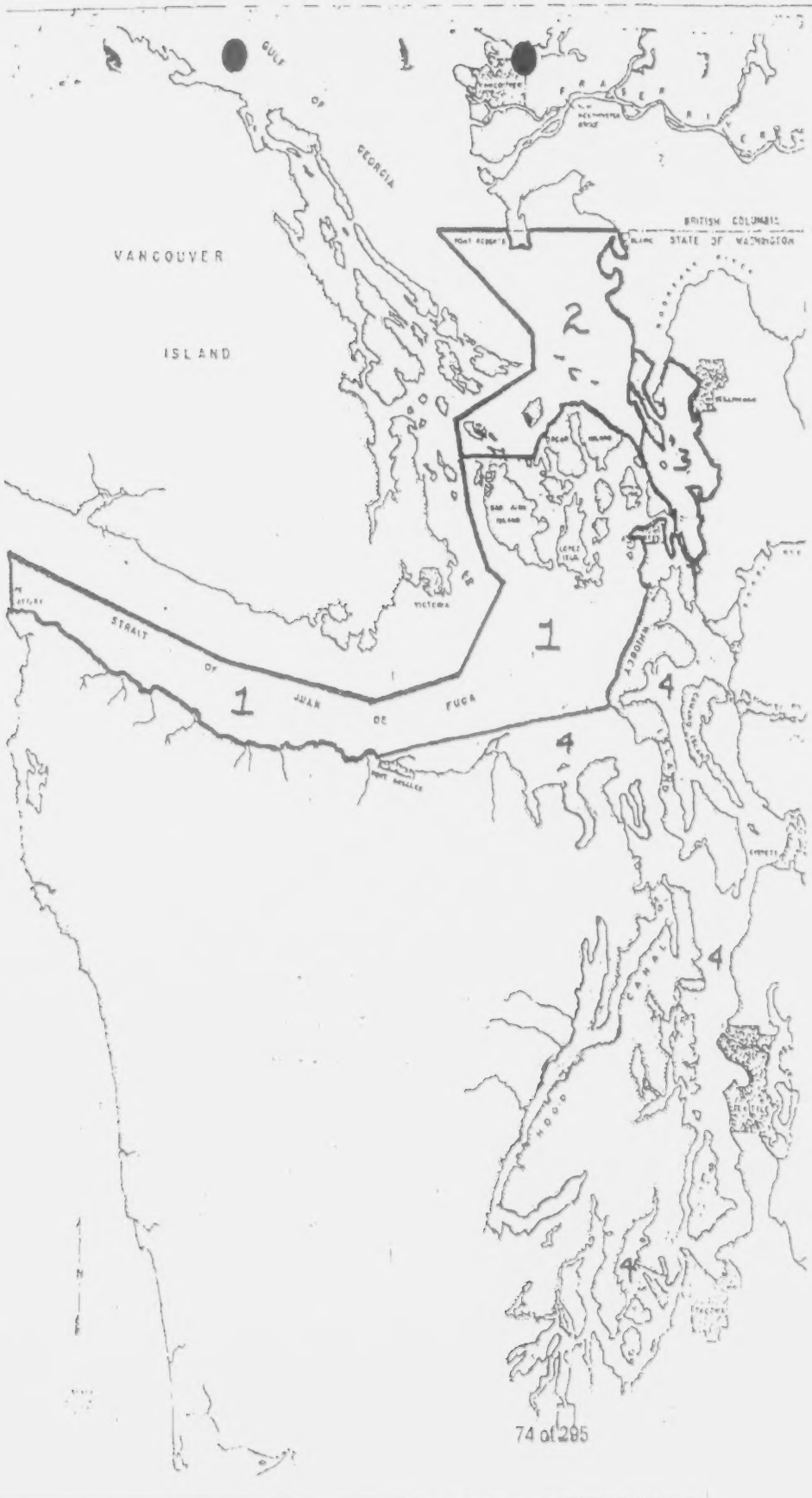
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Supreme Court, U.S.
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No. 10-33

In the Supreme Court of the United States

SUQUAMISH INDIAN TRIBE,

Petitioner,

v.

UPPER SKAGIT INDIAN TRIBE, SWINOMISH INDIAN TRIBAL COMMUNITY, JAMESTOWN S'KLALLAM TRIBE, LOWER ELWHA KLALLAM TRIBE, LUMMI INDIAN NATION, NISQUALLY INDIAN TRIBE, PORT GAMBLE S'KLALLAM TRIBE, SKOKOMISH INDIAN TRIBE, AND TULALIP TRIBES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

It is telling that, because respondents cannot defend the Ninth Circuit's holding, they seek to obscure and recharacterize it. They insist that the court of appeals actually found the language of the controlling judicial order to be "unclear and ambiguous," and assert that the court of appeals looked past the order's plain terms for that reason. But respondents cannot wish away the holding below.

In fact, the Ninth Circuit applied its longstanding rule that requires courts to look behind the language of unambiguous judicial orders to determine whether the issuing judge really meant to say something else. There can be no question about that: the Ninth Circuit clearly and expressly explained its rule in those terms, and characterized Judge Boldt's order as *un*ambiguous – as it plainly is. The question now before this Court is whether the Ninth Circuit acted properly in disregarding the plain language of Judge Boldt's order. Because respondents' grounds for distinguishing the holding below from the decisions of this and other courts rejecting such an approach are insubstantial, and because that holding will lead to "extremely burdensome and expensive" rounds of unnecessary litigation (Pet. App. 12a-13a (Kleinfeld, J., dissenting)), both in the "vital" area of tribal fishing rights (*Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979)) and in the much broader universe of standing judicial orders, further review is warranted.

A. The Ninth Circuit Applied A Rule That Requires Departure From The Unambiguous Terms Of Court Orders.

To begin with, respondents appear to recognize that we have accurately stated the rule in the Ninth Circuit: that rule requires courts to determine whether the judge who initially issued a judicial order intended something other than what the order unambiguously says. They could hardly contend otherwise. The Ninth Circuit held in *Muckleshoot III*, expressly and advisedly, that the role of a court implementing a judicial order is to determine whether "*the court [issuing the order] intended something other than its apparent meaning*." *United States* v. *Muckleshoot Indian Tribe*, 235 F.3d 429, 433 (9th Cir. 2000) (citation omitted; emphasis added by the court). This position was reaffirmed in identical terms by the holding below, which explained that an order's unambiguous language "is not a dispositive factor" in identifying its meaning. Pet. App. 8a-9a. Given this context, respondents' limited contention here accordingly is that the Ninth Circuit did not apply its troubling rule in *this* case.

But respondents should not succeed in confusing the issue here. Although they acknowledge that the district court below "found that the term 'Puget Sound,' as used by Judge Boldt, included Skagit Bay and Saratoga Passage" (Opp. 5), respondents insist that the Ninth Circuit "did *not* adopt the district court's approach." *Id.* at 12 (emphasis in original). Instead, they repeatedly maintain that the court of appeals found Judge Boldt's order "unclear [and] ambiguous" (Opp. 10; see also Opp. 2, 6-7, 12), and they proceed themselves to try to demonstrate that

the order was in fact ambiguous. Opp. 10-13. But they are wrong on both counts.

Accepting the district court's finding that "'Puget Sound' as defined by Judge Boldt included the waters of Saratoga Passage and Skagit Bay" (Pet. App. 6a), the Ninth Circuit recognized that the principal question on appeal was whether the district court should have "engaged in a sufficiency of the evidence analysis *instead of accepting Judge Boldt's unambiguous definition of 'Puget Sound.'*" *Id.* at 8a (emphasis added). Answering that question in the affirmative, the court of appeals found that the district court "faithfully followed the *Muckleshoot* construct" in looking behind that unambiguous definition. *Ibid.* The Ninth Circuit thus "agree[d]" with the district court's analysis, holding that the district court was correct in ruling that respondents met their burden of showing that Judge Boldt "'intended something other than its apparent meaning.'" *Id.* at 9a. Respondents therefore are simply wrong in asserting that the Ninth Circuit "did *not* adopt the district court's approach to the meaning of 'Puget Sound.'" Opp. 12.

Although that is enough to dispose of the matter of ambiguity – for present purposes, after all, the question is simply whether the Ninth Circuit applied its "look behind the unambiguous language" rule – it may be added that the order at issue here is *in fact* unambiguous. As the Ninth Circuit noted in its initial decision in this case, "Suquamish's adjudicated usual and accustomed grounds include 'the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River.' Saratoga Passage and Skagit Bay are in the Puget Sound between those two points." Pet. App. 22a. A glance at the map confirms that reality. See *id.* at 57a. Lest there be

any doubt, Judge Boldt defined "the term 'Puget Sound' [to] include[] the Strait of Juan de Fuca and **all saltwater areas inland therefrom**," as the district court explained below (*id.* at 36a (emphasis added by the court)), and there is no question but that this area includes Saratoga Passage and Skagit Bay. There is no ambiguity here.[1]

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[1] Respondents hint that the Ninth Circuit saw ambiguity in Judge Boldt's order because it noted "specific geographic anchors" in the description of the Suquamish U&A — *i.e.*, the U&A includes Puget Sound from Vashon Island to the Fraser River "including Haro and Rosario Straits * * * and also Hood Canal" — which in respondents' view "confuse and confound Petitioner's view of the meaning of 'Puget Sound.'" Opp. 11-12; see also Opp. 10-13. But that hint is not well taken. The Ninth Circuit expressly understood the order at issue to be *unambiguous*; its reference to "geographic anchor points" described *other* Tribes' U&As (see Pet. App. 10a-11a), which the court considered as part of its broader review of the record undertaken to determine whether Judge Boldt had an unexpressed intent that *differed* from his written order. *Id.* at 9a. Thus, the court's first step after stating that it was prepared to look behind the order's plain language was to consider the evidence before Judge Boldt "as of April 18, 1975," *after* which the court turned to the "geographic anchors" cited by respondents. See *id.* at 9a-11a. As for the "geographic anchors" themselves, Judge Kleinfeld noted in the Ninth Circuit's initial opinion that, although Judge Boldt generally provided "geographical definitions" setting the boundaries of other Tribes' U&As, "specifically identif[ying] bays, straits, and island areas that he intended to include," he "did not do so in Suquamish's determination," "includ[ing] the entire Puget Sound from Vashon Island to the Fraser River." *Id.* at 25a. That "suggests that he intended the boundaries not to be limited." *Ibid.* Of course, the only question here is the legal one whether the Ninth Circuit erred in straying from the plain language of Judge Boldt's order.

B. The Holding Below Is Inconsistent With *Travelers Indemnity* And Conflicts With the Holdings Of Other Courts Of Appeals.

1. Because the meaning of the controlling judicial order therefore is plain, respondents cannot reconcile the Ninth Circuit's holding with this Court's decision in *Travelers Indemnity* and the rulings of other courts of appeals that are cited in the petition. Pet. 20-25. Respondents' principal point regarding *Travelers Indemnity* is that the decision does not "require[] a case to be resolved based on the meaning of a key word or phrase [of a judicial order viewed] in isolation." Opp. 14. But that observation, although surely true, has no bearing on the issue here. The Court in *Travelers Indemnity* clearly, and repeatedly, explained that an order's unambiguous language *must* control: "where the plain terms of a court order unambiguously apply * * * they are entitled to their effect." 129 S. Ct. at 2204. And here, as we have just explained, both courts below found that Judge Boldt's order unambiguously gives the Suquamish the right to fish in the disputed waters. The Ninth Circuit committed its error when it went on to rummage through the record in an effort to determine whether Judge Boldt really meant what he said. That approach, which determined the outcome below, is flatly inconsistent with *Travelers Indemnity*.[2]

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[2] Respondents are incorrect in asserting that the Court found "the key operative term" of the order in *Travelers Indemnity* – "relating to" – to be ambiguous. Opp. 14. The Court noted that beyond some point a literal reading of the term would produce "absurd" results because, at the most abstract level, everything is related to everything else. 129 S. Ct. at 2203-2204. But the Court found that point not reached in *Travelers Indemnity*. *Ib-*

2. As a fallback, respondents assert that *Travelers Indemnity* and the decisions of other courts of appeals that are cited in the petition are distinguishable from the Ninth Circuit's ruling here because, assertedly unlike those decisions, "[t]his case involves a prior factual determination of a court." Opp. 15. *Travelers Indemnity* and the other decisions cited in the petition, respondents continue, involved the application of court orders that "do not reflect an external record in the same way." Opp. 17. But this is no distinction at all. The question in *all* of these cases is whether it is permissible to look behind a court order's language to see whether the issuing judge did not really mean what he or she plainly said. There will *always* be some "external record" available to the parties and a second judge if they care to make that sort of after-the-fact determination – testimony, the arguments that were presented to the first judge, and so on – just as there was in *Travelers Indemnity* itself. See 129 S. Ct. at 2204.[3] In this regard, there is

id. And here, too, there is nothing absurd about reading "Puget Sound" to mean Puget Sound. As for respondents' observation that the Court in *Travelers Indemnity* examined the detailed findings of the bankruptcy court (see Opp. 14-15), it did so to identify the nature of the plaintiffs' claims, not the hidden meaning of the court's order. See 129 S. Ct. at 2204.

[3] The same was true in the court of appeals decisions cited in the petition. In *Negron-Almeda* v. *Santiago*, 528 F.3d 15 (1st Cir. 2008), for example, the question was whether a 2004 order granting summary judgment against particular individual defendants precluded claims for both damages and equitable relief. In a subsequent decision the district court agreed with plaintiffs that equitable relief remained available, explaining that "'it was never its intention to bar Plaintiffs from seeking and obtaining equitable relief at the time of the [2004] dismissal of their monetary claims.'" *Id.* at 20. Defending this ruling on appeal, the plaintiffs observed that "the district court itself took this view of the order three years after entering it," "the

no difference at all between a ruling that sets fishing boundaries and one setting the scope of an anti-suit injunction.

The Ninth Circuit did not suggest otherwise, and did *not* premise its rule on respondents' theory that Judge Boldt's order was uniquely "tethered to the factual record before the court." Opp. 17. To the contrary, the court of appeals thought it appropriate to disregard unambiguous court-order language because "[t]here are important distinctions between interpreting a judicial opinion and a statute"; "the rules governing the interpretation of the two reflect this"; "there are no canons of construction for the interpretation of opinions"; and "[o]pinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis." *Muckleshoot III*, 235 F.3d at 432-433. This reasoning applies uniformly to *all* court orders.

3. Respondents also maintain that *Travelers Indemnity* has no bearing here because it involved "a

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case law cited in the lead-up to the 2004 order deals with the prohibition against bringing section 1983 claims *for damages*," and additional contextual evidence supported that view of the district court's original intent. *Id.* at 23. But because the First Circuit found that the 2004 order was "clear on its face" in precluding injunctive claims, the court of appeals rejected reliance on record evidence in construing that order: "the district court was bound by the plain meaning of the 2004 order." *Id.* at 23-25. *See also, e.g.*, *SEC* v. *Hermil, Inc.*, 838 F.2d 1151, 1153-1154 (11th Cir. 1988) (notwithstanding "a substantial and convincing amount of evidence" that the district court entering an order had intended something different from its plain meaning, the court of appeals enforced the order as written because the district court "did not draft the [original] order to reflect this intent").

type of consent decree"; such decrees, in respondents' view, are subject to rules that differ from those governing other court orders because the parties to consent decrees "'agree[d] on their precise terms.'" Opp. 16 (citation omitted). But that, too, is wrong. The parties seeking to escape the plain terms of the court order in *Travelers Indemnity* included individual claimants who had *not* been involved in the bankruptcy reorganization that underlay the *Travelers Indemnity* litigation (see 129 S. Ct. at 2201-2202), and who therefore were not parties to the negotiation of any agreement. And in any event, the Court in *Travelers Indemnity* drew no such distinction: it did not indicate that the order before it was the product of agreement. It stated in universal terms that "a court should enforce a court order, a public governmental act, according to its unambiguous terms." *Id.* at 2004. The point is proved by the Court's reliance for its rule on *Negron-Almeda* and *Spallone*, which had nothing to do with consent decrees. See Pet. 20.

C. The Rule Applied By The Ninth Circuit Is A Broad One Of Substantial Practical Importance.

Respondents ultimately retreat to the contention that the Ninth Circuit applies its aberrant rule only to the *United States* v. *Washington* litigation. They maintain that the decision below and *Muckleshoot III* "embody an approach adapted and tailored to a particular type of sub-proceeding (interpretation of U&A findings) in the particular case in which it arose, *United States v. Washington*." Opp. 19. Even if that were so, however, review would be warranted. As we explained in the petition, the *United States* v. *Washington* set of proceedings themselves have enormous significance: they involve the treaty rights of no few-

er than twenty Tribes; determine matters that this Court has labeled "vital" to those Tribes and to the economy of the Pacific Northwest generally (*Fishing Vessel*, 443 U.S. at 664, 668, 678); and are continuing to consume judicial resources on a vast scale. It is a matter of considerable importance that the rules governing this body of litigation be appropriate ones. Respondents have not a word to say about this.

But more fundamentally, the rule applied by the Ninth Circuit here is *not* limited to cases growing out of *United States* v. *Washington*. The Ninth Circuit has stated a general rule for the interpretation of judicial orders that, as we have explained, is premised on the court's view that "[t]here are important distinctions between interpreting a judicial opinion and a statute." *Muckleshoot III*, 235 F.3d at 432-433. The Ninth Circuit nowhere suggested that its rule is limited to tribal fishing cases. And although *United States* v. *Washington* is a very big litigation, the issues it presents (insofar as is relevant here) are identical to those presented by any other judicial order that is applied over time – such as those involving school desegregation, water rights, environmental decrees, and innumerable others. Respondents' objection to the Suquamish U&A is not that it is different from other types of court orders because it is unworkable in practice (see Opp. 19-20); it is that the U&A is much broader than respondents would like.[4]

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[4] Respondents are simply wrong in asserting that there is "no evidence" that "Suquamish even traveled through Skagit Bay and Saratoga Passage" and that there is "uncontroverted evidence that these waters were specifically excluded." Opp. 20. The short answer is that Judge Kleinfeld, dissenting below, rejected both of these assertedly uncontroverted propositions. See also Pet. App. 24a ("the natural route" between two Suquamish

In that regard, respondents get no support for their assertion that the Ninth Circuit "is in complete agreement" with "the general rule" that unambiguous court orders are to be applied as written from their observation that the Ninth Circuit has several times stated that the meaning of a consent decree "'must be discerned within its four corners." Opp. 21-22 (citation omitted). Respondents themselves, of course, have insisted that consent decrees are subject to *different* interpretative rules than are other judicial orders. And respondents have not, in any event, denied that the Ninth Circuit *does* apply its peculiar "disregard the plain language" rule, at least in the *United States* v. *Washington* context; that is just what the court said (and did) in the decision below and in *Muckleshoot III*. This Court took a different approach in *Travelers Indemnity*.

D. The Decision Below Undermines Principles Of Finality And Repose.

Finally, it should go without saying that respondents are wrong in contending that the Ninth Circuit's approach furthers the interests of finality and repose. The rule we advocate, which is the one applied in *Travelers Indemnity* and by other courts of appeals, starts and ends with the plain language of an unambiguous court order. The Ninth Circuit, in contrast, allows a party and a subsequent court, decades after the fact, to look behind the language of an unambiguous order, revisit the record and review extrinsic evidence, and conclude that the first judge couldn't have meant what he or she plainly said. This is a formula calculated to produce uncertainty,

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fishing grounds "goes directly through Saratoga Passage and Skagit Bay").

unsettled expectations, and duplicative litigation – an approach that Judge Kleinfeld correctly labeled "extremely burdensome," "expensive," and "fundamentally futile." Pet. App. 13a. This and other courts therefore have good reason for insisting that, "where the plain terms of a court order unambiguously apply * * *, they are entitled to their effect." *Travelers Indemnity*, 129 S. Ct. at 2204. Review of the Ninth Circuit's contrary conclusion accordingly is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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